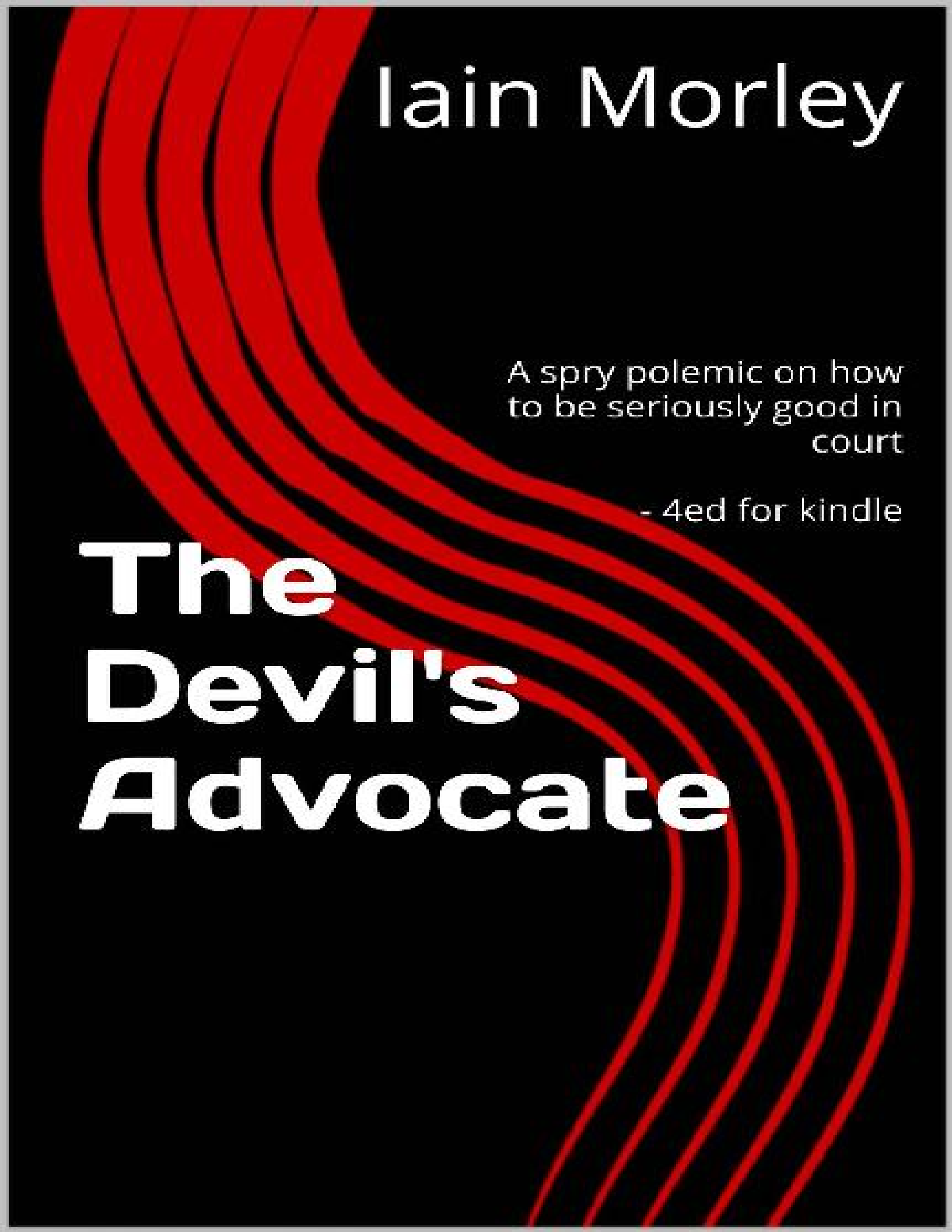

Iain Morley
A spry polemic on how to be seriously good in court
- 4ed for kindle
The Devil's Advocate

The Devil's Advocate

A spry polemic on how to be seriously good in Court

4ed for kindle

Iain Morley

August 2017

Iain Morley QC

This 4th edition is to help kindle readers, following requests from worldwide, to get as a downloadable ebook the now famous work on advocacy skills **'The Devil's Advocate** – a spry polemic on how to be seriously good in court**'**. It is pretty much the same as the 3rd edition paperback of 2014, though updates that the author is now a High Court Judge.

What has been said about 'The Devil's Advocate':

'...the book of my dreams, the Titanic of the advocacy world (even though it is modestly sized)...Iain Morley has bridged the gap between reading about advocacy and how you actually do it... [the book is] warmly welcomed and should be in every white wig box.'

Phillip Taylor, MBE Barrister at Law, in *The Barrister*

'Quite simply [this] is the best book of its kind. Indeed it is the only book of its kind… Buy this book. Study it. You won't regret it.'

Professor A.R. Forrest, University of Sheffield, in *Science & Justice*

The Devil's Advocate is now a best-selling paperback advocacy manual in the UK and worldwide, in its third edition, published by Sweet & Maxwell, bringing a fresh approach to the Dos and Don'ts of good advocacy. Written with humour in a conversational style, explaining clear techniques, with the helpful feature that only one or two points are raised on each page, the work takes you through the practical application of advocacy step-by-step.

The Devil's Pupil is designed to be a companion work, in which the techniques described in *The Devil's Advocate* can be seen at work in the transcripts of famous trials. Sections of what happened in court have been published, with commentary, written with the same sense of humour and directness for which *The Devil's Advocate* is famous.

The Devil's Junior is the next step up, just as a Pupil will wish to become a Junior at the Bar. And it reviews the greatest trial in history – the Nuremberg trial of 1945-46. Advocates determined to be seriously good in court will want all three books.

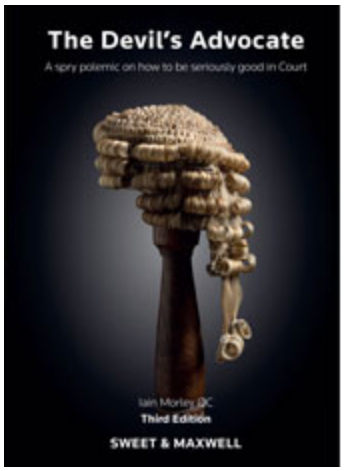
Iain Morley has over 25 years Call and has been a QC in well-known London criminal chambers. He has prosecuted and defended in serious crime at every level in the Crown Courts and Court of Appeal, and practiced for eight years in the international criminal tribunals. Domestically, he teaches advocacy skills to pupil barristers, solicitors, Silks and Judges, and worldwide has appeared or taught in 33 jurisdictions.

He is now a High Court Judge in the Eastern Caribbean Supreme Court.

***

Published as a paperback by Sweet & Maxwell

First Edition – 2005
Second Edition – 2009
Third Edition - 2014



Iain Morley QC

iainmorley@gmail.com

No part of this publication may be reproduced or transmitted, in any form or by any means, or stored in any retrieval system of any nature, without prior written permission, except for permitted fair dealing under the Copyright, Designs and Patents Act 1988, or accordance with the terms of a license issued by the Copyright Licensing Agency in respect of photocopying and/or reprographic reproduction. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgment of author, publisher and source must be given.

Copyright – all rights reserved

***

Praise for the first edition of The Devil's Advocate

'...the book of my dreams, the Titanic of the advocacy world (even though it is modestly sized)...Ian Morley has bridged the gap between reading about advocacy and how you actually do it... [the book is] warmly welcomed and should be in every white wig box.'

Phillip Taylor, MBE Barrister at Law, in *The Barrister*

'*The Devil's Advocate* is written in a most unusual style. It really is a fresh approach to explaining the art of advocacy… I found the examples fascinating, easy to follow and eminently sensible. My congratulations to Morley for his 'short polemic.' He should not underestimate its importance.'

Michael Caplan QC, Kingsley Napley, in *Solicitors Journal*

'As someone who has generally never found books on advocacy much use, I would be genuinely happy to recommend this work. It is easy to pick up and flick through. It is nothing if not fun to read. It rams home some basic but nevertheless intelligent and important propositions which even the best advocates often lost sight of… we can all learn from its wisdom.'

Charles Hollander QC, Brick Court Chambers, in *Legal Week*

'Quite simply [this] is the best book of its kind. Indeed it is the only book of its kind… Buy this book. Study it. You won't regret it.'

Professor A.R. Forrest, University of Sheffield, in *Science & Justice*

‘As a law student, I don't think I could have found a better guide to advocacy. I'd recommend it to anyone who ever has to do a moot, show up in court, or simply make a presentation. Its advice is as relevant to an experienced lawyer, as it is to a law student….’

Law student, Toronto

‘This book is easy to read and digest. It gives superb guidance and assistance on advocacy. It's totally practical. It's a weapon in your hand.’

A Junior London Barrister

‘From the outset, Morley states that the approach is practical, drawing upon his admirable experience as an advocate without any discussion of the theoretical bases. This is a rough and ready, but absolutely authoritative guide or handbook to advocacy - the dos and the don'ts.’

Customer review, Amazon

***

Following the second edition,
a selection of emails from advocates worldwide

I'm an advocate here in New Delhi (India). Please tell me how can I get your book The Devil's Advocate ??????

Thank you sir
Avadh Kaushik

I'd like to thank you very much for writing your excellent book, The Devil's Advocate. I found the information contained therein very useful! They layout too, made the book easy to follow and engaging.

With best wishes,
Adam Pogonowski

I am a second year student of law at Kisii University College in Kenya. I write, to highly appreciate you for your willingness to share with us and the whole world your vast experience in advocacy through your book *The Devil's Advocate, 2nd ed*. It's so inspirational and educating.
Be blessed,
Mokaya John

I am a British-Tanzanian BPTC student. Having read your book *The Devil's Advocate* and learning you are in Arusha, I felt compelled to contact you and let you know that I thoroughly enjoyed your book. It is by far the most useful tool I have come across in advocacy. I know several other students at the BPP who have also found it brilliant and you should know that your book is permanently in my bag.

Best wishes,
Aleisha Ebrahim

As a BPTC student, I have just finished reading your book *The Devils Advocate*. It is outstanding, and sort of book I had been looking for, so long. Thank you very much.

Regards
Saumitra Sarder

Greetings from Singapore. I am writing to thank you for sharing your wisdom, knowledge and advice with us all. I am a legal officer with the Revenue Authority. I just bought a copy of your book, The Devil's Advocate. I find it very helpful, and that it offers very many very sensible and practical advice and tips.

Thank you.
Jimmy Y H Goh

Thank you for sharing with the legal profession your book on how to be seriously good in Court. It was most helpful, insightful and inspiring. I even read it three times before I marked it!

Thanks again,
Neil Kumar

This email is a simple thanks for an excellent - and approximately three hour - read. (Accompanied by two-and-a-half cups of tea). I am about to start the first year of my Law degree. While I have a good few years before I will, hopefully, enter a courtroom, the advice in your book will be invaluable. As you say, "practise, practise, practise!" – that is exactly what I intend to do.

Kindest regards,
Isaac Paine

I am an Australian law student currently halfway through a Masters of Comparative Law degree studied in Adelaide, South Australia and Mannheim, Germany. I am also in the process of being admitted to the South Australian Bar. Very recently during a work placement, one of the barristers recommended that I purchase and read your book "The Devil's Advocate", as he said that it was a "must read." He was very right. I have just finished reading the last page of it and thought that I would say thank you for putting your experiences and opinion to paper and publishing your book. It taught me a lot, and I found it very educational.

Thanks again for such a great read.
Peter Kassapidis

I have just finished reading your book, *The Devil's Advocate*. I just wanted to say it was a breath of fresh air and the best law related book I have ever read. I aspire to become a QC, and I will take your book every step of the way with me, it was fantastic!

Kind Regards,
Mariagnes Neesham-Teixeira

I am a lawyer in Nigeria and have just completed reading your book, The Devil's Advocate, which our lecturer recommended to us in the law school. I must say that the book has taught me so much and reduced by 50% my use of language both in legal practice and in private relations.

Thanks,
Msoo Dio

A quick note from Dublin to say thank you for writing your little book. I am a lay advocate specialising in Social Welfare Law and I work closely with members of the legal profession. Your book helps and I intend to use it in my work.

Yours sincerely
Ciara Murray

I am on summer break from law school at the University of Toronto. I enjoyed reading *The Devil's Advocate*. I already feel more prepared and confident - good book, undoubtedly useful, much appreciated.

Yours Truly,
Cameron Funnell

With due respect, I most humbly would like to say that I had the opportunity reading your book *The Devil's Advocate, first edition, 2005*. Your book is concise but also precise. I have recently bought your updated version i.e. 2009, 2nd Edition. This edition is highly readable and easy to understand and deals with all the essential lawyering skills with regard to trial advocacy. As Lord Francis Bacon stated that – 'Some books are to be tasted, others to be swallowed, and some few to be chewed and digested - to me, it shall never be an exaggeration to state that your great works on trial advocacy skills – "The Devils Advocate" is one of such books that is to be chewed and digested. I have no other suitable phrases except saying that we, the Lawyers' Community of the World, are heartily grateful for your extra-ordinary works on advocacy skills.

Yours sincerely,
Khandaker Mohamamd Musfiqul Huda
Advocate, Bangladesh Supreme Court

I have just this second finished a Chapter in your brilliant polemic. I am a law student in Glasgow, with intentions of practicing at the Scottish Bar as an Advocate after qualifying. Many thanks for a great read. I used the "wriggling toes" and the "hands behind the back" 84.5 degrees posture tricks in a Plea in Mitigation exercise in my criminal class.

Regards,
Ryan Corey

I am very impressed by the picture of right advocacy painted in your book. It seems to me to be just how it should be done and the style to adopt. Also, the style of expression, both in terms of language used and visual presentation, clearly conveys that style. Indeed, having wrongly thought I had lost the first copy I bought, I promptly bought a second so I could re-read the work. A member of our staff is making her way to her feet at the moment and I am going to give her one of my copies.

Kind regards
Brian Coulter, Solicitor
POWELL SPENCER AND PARTNERS

I write regarding your book on advocacy, which, as a junior member of the Bar, I have read and re-read multiple times. I always come back to it before beginning a trial.

Sincerely yours,
Nathaniel J Hartney
Hartney & Compnay
Vancouver

***

About the Author

Iain Morley has been a barrister and practiced in criminal law from chambers at 23 Essex Street, London.

In November 2016, he was appointed a High Court Judge of the Eastern Caribbean Supreme Court.

He has practiced in all aspects of domestic criminal law, and since 2005 has become a well-known figure on the international circuit, practicing in genocide, war crimes, crimes against humanity, and international terrorism. He has appeared and taught in 33 jursidictions.

He read law at Lady Margaret Hall, Oxford, was called to the Bar of England and Wales by Inner Temple in 1988, and was appointed Queen’s Counsel in 2009.

He has been in a number of high profile cases in England, including the *Sarah Payne* murder in 2001.

From October 2004, for five months, he assisted the defence of *Slobodan Milosevic* at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague.

He was then from March 2005 in Arusha, Tanzania, assisting the UN to prosecute the 1994 Rwandan genocide of the Tutsi by the Hutu at the International Criminal Tribunal for Rwanda (ICTR), where he was Trial Counsel in four lengthy cases.

In April 2009, he was appointed Senior Trial Counsel at the UN Special Tribunal for Lebanon (STL) in The Hague, just as the Tribunal opened, where he then marshalled the evidence, and wrote the indictment, confirmed in June 2011, against the alleged assassins in 2005 of former Lebanese Prime Minister, *Rafik Hariri.*

In Janaury 2013, he returned to London domestic practice, where he was daily mostly in murder trials.

In addition, Iain Morley is an established advocacy teacher, nationally and internationally, and ***The Devil's Advocate***, in its third edition, is currently worldwide a bestselling book on advocacy skills.

He is an A-grade teacher-trainer for the Inner Temple, where he is a Bencher, and he trains and grades trainers and barristers. He was on the Inner Temple Advocacy Committee from 1992 until 2005, wrote much of the criminal course materials for the pupils and juniors between 1998 and 2005, and has been a course director of several of the Inner Temple advocacy residential weekends in years past. In addtition, since 2009 he has taught at the week-long annual Advanced Advocacy Course in Keble College, Oxford, organised by the South Eastern Circuit.

He is an honorary Professor of Advocacy at Nottingham Law School and a visiting Professor of Law at Coventry University.

He has also taught in Sarajevo, Warsaw, Trier, Vienna, Sofia, Dublin, Dubai, Karachi, Islamabad, Tashkent, Arusha, Phnom Penh, Kuala Lumpur, Harare, Bulawayo, Mutuare, Antigua, Montserrat, St Lucia, St Helena, and in The Hague at the ICTY, STL, International Criminal Court (ICC), Special Court for Sierra Leone (SCSL), and at the Universities of Oxford, Cambridge, London, Birmingham, Durham, and annually at Leiden.

***

ACKNOWLEDGEMENTS

For the third edition

I would very much like to acknowledge assistance, through all three editions, in the final drafts of this work from the following:

His Honour Judge Richard MacGregor-Johnson and Her Honour Judge Joanna Korner CMG QC – both Masters of the Inner Temple Bench and former Chairpersons of the Inner Temple Advocacy Committee.

Lord Justice Christopher Floyd, His Honour Judge Toby Hooper QC, and Charles George QC – all Masters of the Inner Temple Bench and at different times members of the Inner Temple Advocacy Committee.

Kenneth Aylett – Master of the Inner Temple Bench, past member of the Inner Temple Advocacy Committee, and one who in the past has suggested I write this book.

His Honour Judge Oscar Del Fabbro, Mr Justice Stephen Hellman (Bermuda), and District Judge Gareth Branston – during the first edition then barristers practicing in criminal law.

Michael Hall SC – former law lecturer at the University of Oxford and presently in practice at the Bar in Sydney.

Alexander Kleanthous – solicitor in civil practice.

Leslie Cuthbert – A Recorder of the Crown Court, and former partner in a leading London criminal solicitors, whose enthusiasm as a practising criminal solicitor for this work was very encouraging.

Sarah Clarke QC – barrister and Master of the Inner Temple Bench, who was invaluable in reviewing and offering some of the content on the chapter on Vulnerable Witnesses.

Stephen Rapp, formerly the US Ambassador-at-large for Global Criminal Justice, and formerly the Prosecutor for the Special Court in Sierra Leone, who while Chief of Prosecutions at the UN International Criminal Tribunal for Rwanda in Arusha, suggested I add a chapter on international criminal practice.

Lady Justice Ines Monica Weinberg de Roca, formerly a Judge at the ICTR, and a designated Appeals Judge for both the ICTR and ICTY, who helpfully reviewed the new chapter on international practice.

All my colleagues at the Inner Temple Advocacy Training Faculty, and at the Advocacy Training Council, and on the faculty of the South Eastern Circuit's annual advanced advocacy course hosted by Keble College Oxford, who keep telling me the book is worth reading.

All the readers who have written to me, with thanks and suggestions – there are now hundreds of you.

And finally Nicola Thurlow, the publisher with Sweet and Maxwell, who in late 2004 patiently listened to my suggestion this book would sell, was persuaded, and put it on the bookshelves.

***

Dedication

This book is dedicated to my three children, who are

Helen,

James,

and Ben.

Iain Morley
23 Essex St
London

April 2005

***

A Note

on the kindle edition
which is technically the fourth edition of this book

This book is I think, finally, pretty much everything I can teach about advocacy, gleaned from years in courtrooms both at home and around the world, and from teaching the skill of persuasion worldwide. It used to be called a 'short' polemic, and as it has got longer I am having to call it 'spry', but I hope its rapid readability remains the same.

The Devil's Advocate has gone viral, which is flattering, and is being translated into other languages. To my many readers, wherever you are, please remember that I do not claim to be the best – I am a harsh critic of my own work - I give myself a B, often a B+, maybe on a good day an A, only sometimes an A+, and I still take great pleasure in watching an A* at work – they are out there, go find them, learn from them, and take the basics in this book to your next level.

This 'fourth edition' is pretty much the same as the third edition paperback available from Sweet & Maxwell. However, it is for kindle. This is to help the many Caribbean lawyers, who are among my new friends, and others in the world, who have said to me, personally and on email, that acquiring a paperback is not always practicable owing to remoteness and postal difficulty, and have asked instead for an ebook download. There used to be one, but I am told by many no more. So, here we are. In this way, I hope I am providing further service to the profession and that the rules of advocacy can travel even wider. And after, perhaps you'll want the book.

Iain Morley QC

Morley J
High Court Judge
Eastern Caribbean Supreme Court

August 2017

***

The Devil's Advocate

A spry polemic on how to be seriously good in Court

Chapters

1 This Book
2 Learning Advocacy
3 Truth
4 Winning
5 Tribunal Psychology
6 Persuasiveness
7 Case Preparation
8 Addressing the Judge
9 Legal Writing
10 Document management
11 The Opening Speech
12 Witnesses
13 Questions
14 Examination in Chief (sometimes called 'Direct-Examination')
15 Cross-Examination
16 Re-examination
17 Improving Questioning
18 Experts
19 Vulnerable witness
20 The Closing Speech
21 Bail & Mitigation
22 The Court of Appeal
23 Advocacy in International Criminal Tribunals
24 Improving Advocacy
25 On being led as Junior Counsel (sometimes called 'Co-Counsel')
26 Bar Ethos

***

Chapter 1

This Book

This book, now in its paperback third edition, has got longer.

It will now take you maybe four hours to read. It used to take two.

Like I said in the earlier editions, I hope you may never forget what you read here - which from the book's growing worldwide following seems likely.

I hope you will come back to it time and again.

Keep the book for reference.

It has been published as a paperback so you can carry it about.

It is full of good ideas which in the early years of your practice you can dip into while thinking of what to do in a case.

With reading it, your advocacy will probably improve immediately.

I used to say 'it's almost guaranteed', but am confident enough nowadays from feedback to say, actually, it's pretty much a dead cert.

***

This is not a reasoned academic text. It is a polemic. It is about being good in court - no messing, no guff, no clever arguments, no tedious endless proofs and justifications. It tells it as it is.

It is about how to do the job really well in your early years.

***

So it applies to *all advocates of up to five years' experience.*

It is designed to be read easily by anyone interested in becoming effective in court - *effective*, important word, not 'brilliant' - whether presently at school, in university, at law school, or in the early stages of doing the job at the Bar or as a solicitor.

It is written with crime in mind. But many of the rules apply to the courtroom in civil practice too.

The book will make sense wherever the justice system is *adversarial*.

This means wherever there is a Common Law tradition, found through the Commonwealth and in the US. However, with the emergence of international criminal trials, in the last five years these advocacy techniques are permeating into non-adversarial legal cultures. So a lot of what is in this book is now being taught – and sometimes I've taught it - in Scotland, Ireland, Holland, Poland, Russia, Israel, Lebanon, Egypt, Tunisia, Libya, Dubai, India, Bangladesh, Cambodia, Hong Kong, China, South Africa, Zimbabwe, Malawi, Tanzania, Kenya, Uganda, Rwanda, Congo, Nigeria, Ivory Coast, Sierra Leone, Liberia, Senegal, Cameroon, Gambia, Ghana, Australia, New Zealand, Mexico, Canada, and of course the US.

The rules of advocacy are travelling widely.

***

I’ve written this work in pretty much my style of speech from when I teach advocacy students. The book should read like I am talking to you, with colour and enthusiasm. It shouldn’t feel like you are reading. I am hoping the style will be effective in communicating what may otherwise be a series of rather dull rules. Apologies if I appear to over-egg it in places - and drive you a bit nuts - you’ll see what I mean.

But at least, you’ll probably remember what’s been said.

And where I refer to an advocate or judge, or anyone really, I will use the expression ‘he’ in one chapter, and then ‘she’ in the next, alternating, in an effort to be gender neutral.

***

You won't agree with everything you read.

Good.

At least you are thinking.

Thinking about advocacy.

About what works and what does not.

And why.

The book is called *The Devil's Advocate* because it may make you see advocacy from a new perspective.

Your assumptions will be challenged.

***

Each page will contain one or two thoughts, usually not more. You may have noticed this already.

Some pages will therefore be short.

Like this one.

Try not to fly through the book.

Instead, think about each page as you read it. Lodge each thought in your mind.

Don't skim. Think.

***

As for myself, I don't pretend I can do advocacy right every time in court, but I think I've come across what works.

And I know I will
always
always
always be learning.

It is part of why I love teaching – I learn a new idea every time I teach a class.

So, this book is everything I have learned – up to now – I hope it helps.

***

Chapter 2

Learning Advocacy

Advocacy is a skill.

The skill of persuasion.

It is an art, not a science.

It is not about *forcing* people to agree with you.

An advocate *persuades* – she makes people *want* to agree with her - and persuasion takes *skill*.

And like any skill, ADVOCACY CAN BE LEARNT.

Up to a point.

It used to be said that advocacy cannot be taught at all, that it can only be learned through a mystical process of quasi-osmosis, where a pupil will unconsciously absorb these skills from mere proximity to a supervisor, like the skills are a type of flu. Nonsense. But like any skill, you can only be taught some of it - maybe a lot of it - but not everything - at some point you will have to make your own way over what we might call the ‘advocacy keyboard’.

***

No one can be taught to be a brilliant advocate just as no one can be taught to be a brilliant pianist.

Brilliance requires talent.

Whether any of us have talent is in the gift of the Gods. Good luck with whether you have talent – it will take seven years of practice before you know.

However, we can be TAUGHT COMPETENCE in advocacy.

Competence is…well…*not making errors*.

We can be taught how not to make errors.

Simply that - no more complicated than that - no errors.

***

Just as most people can be taught to play the piano, so too can they be taught advocacy. An error-free performance on the piano, like perhaps a youngster playing Beethoven's fairly simple *Fur Elise*, is creditable, will raise murmurs of approval, and generally cannot be much criticised. The youngster may not be destined to be a brilliant pianist, but an error-free *Fur Elise* is something most youngsters can be taught to play, even if a little woodenly.

In the same way, we can learn an error-free performance in court.

But unlike the pianist, an error-free performance in court is something more - *it is highly unusual.*

When I see one in court, I am tempted to ring church bells.

Advocacy without errors is no small achievement.

***

As with any skill, PRACTISE is what is necessary.

And by ‘practise’, with an ‘s’, I mean the verb for getting up and repeatedly doing a thing until you get good at it – note the different spelling from ‘practice’, with a ‘c’, which is the verb for carrying out a profession.

Lawyers love distinctions like this – if you don’t get this one, resign already.

***

Reading books like this will be perfectly useless in the absence of practise.

We learn advocacy by doing.

So practise.

Practise. Practise. Practise.

The ideas in this book are for trying out. If something does not work for you, form that opinion *after* you have tried it - not before. There will be suggestions you disagree with, but what we must avoid is an armchair debate.

TRY THINGS OUT - then debate them - not beforehand.

Advocacy should involve experimenting.

Regularly.

Trying to improve *existing* skills.

Trying to create *new* skills.

Don't sit around. Get up and do.

Avoid intellectualising, roll up your sleeves, and step up.

***

Practise in front of the mirror.

Practise in front of friends.

Practise to and from work in the quiet of your mind on the train.

Don’t be shy to talk out loud, to yourself, honing your skill – it is not madness, if in private – I guess just don’t do it in the supermarket or pubs.

Always be looking for ways of
phrasing questions,
turning phrases,
encapsulating arguments,
controlling witnesses,
and more – don’t ever stop wondering.

Think new ideas – work on them, and have the courage to try them.

***

It is astonishing how few have ever read an ADVOCACY BOOK.

There are large academic texts available from the US, which are sometimes avoided, because they can appear dense and intimidating.

However, they can be very good. Really.

Try *Fundamental Trial Techniques* by Thomas Mauet. It is a bit heavy-going, but thorough, and has loads of ideas. See if your Inn or university has a copy.

Try also George Hampel's *Advocacy Manual*, from Australia, which is brim full of ideas and fun.

And of course, there are many thinner contributions which offer advice, and particularly which quote from brilliant past cases. The cross-examination of Oscar Wilde by *Edward Carson* is a powerful read. Snippets of other less famous cases are instructive and often amazing.

Surely every advocate should have read:

Richard Du Cann *The Art of the Advocate*
Francis Wellman *The Art of Cross-examination*

Please - have a look for them now.

***

The modest aim of this book is to teach you competence.

I am hoping after you have absorbed the ideas here, and then put them into practice, you will play advocacy's *Fur Elise* without mistakes, even if a little woodenly at first.

It will then be up to you how good you get, and in time, as you become more sophisticated and fluent on the advocacy keyboard, you will learn for yourself whether you have the talent of an *Abraham Lincoln* or *Marshall Hall* or *Clarence Darrow*.

But before we can run, we must walk.

***

Chapter 3

Truth

‘Truth’ is a tricky area.

Rightly or wrongly, adversarial advocacy is not really an enquiry into the truth.

The inquisitorial system of Civil Law, for example on the Continent in Europe, is judge-led, and seeks the ‘truth’ – generally, the judge decides what evidence to hear and asks the most important questions, and then adjudicates. The adversarial system of Common Law in the UK and elsewhere is advocate-led, and has a different focus – generally, the advocates decide what evidence to call, or not, and ask the important questions, while the Judge or jury listens to what is called and tested, and then adjudicates on what has been heard.

So here’s the point: for the advocates, the adversarial system creates a polite contest.

The contest is this:

1 while a judge or a jury will seek out the truth as best they can from listening to the evidence called by the advoctes,
2 instead the advocates use their skill to test the evidence,
3 and to control the way the evidence emerges,
4 *and then they comment in closing on whether a case, having been tested, has been proved against the burden and standard of proof.*

For the advocate, it is all about the test, and not necessarily the truth. Perhaps it should not be like this, but in reality this is what happens.

***

What is the truth of an incident?

Truth of course is a large concept. Philosophers have written about it for thousands of years. Many would say there is no objective truth, that there are really only different perspectives.

However, if there is an objective truth, unfortunately adversarial courts do not always find it. This is why we often hear folk talking in pubs of ‘people getting off’, which implicitly suggests a thing happened, but it was not proved in a courtroom test.

***

I'm only saying what the reality is. I'm not trying to be controversial. I'm saying it as it is, as I promised. No guff. No philosophising.

And the truth is that the adversarial advocate is not really enquiring into the truth of an incident. In court, there is a well-mannered contest, in which there are rules, and it is possible to win, even in the face of seemingly overwhelming evidence if you *play the rules better* than your opponent, and above all, learn to be the *more persuasive*.

***

The system is supposed to work on the assumption the advocates are evenly balanced, and so they cancel each other out, leaving the tribunal to consider the evidence after it has been examined.

But the flaw in the theory is that advocates can have uneven skills… …and usually do.

Your job is always to try to be more skilful in the art of advocacy than your opponent.

So, your job is to work at getting better, every day.

A good advocate can win a weak case, particularly if against a less able advocate.

***

In court, there is acting, and there are games of strategy. Maybe there should not be, but there are, every day, all over the country.

Witnesses often exaggerate in order to win, admitting no failings for fear they will damage their case. And encouraging the witnesses, or against the witnesses, are the advocates, whose job is not to give up, even when the case seems hopeless.

But for the good advocate, there is no such thing as a hopeless case.

ADVOCATES TRY TO WIN THEIR CASES WITHIN THE RULES,

IRRESPECTIVE OF THE TRUTH…

…and irrespective of that hopelessness.

And often it is never entirely hopeless for the skilful advocate.

***

Lawyers praise advocates who have succeeded with weak cases, not as a mark of the truth having triumphed, but as a celebration of the advocate's skill.

And remember, cases will often turn on what evidence within the rules an advocate has skilfully managed to keep *suppressed*.

Often, it can be more important when questioning witnesses to KNOW WHAT NOT TO ASK - to know what areas will get you into trouble with the witness - and so avoid them**.**

***

So there it is - rightly or wrongly, an advocate's job in the adversarial courtroom is not strictly-speaking about finding out the truth. It is important to understand this, sad or illogical as it may seem, right from the outset of the advocate's career.

If not about truth, what then?

***

Chapter 4

Winning

Being an advocate is about WINNING WITHIN THE RULES.

Perhaps it shouldn't be.

But it is.

The goal is to win.

And the means of winning is by being persuasive.

We each strive, and should strive, to win, but *always, always, always within the rules.*

***

There are the rules of evidence and the rules of law. You are assumed to know these. Nothing more will be said about them here.

***

It appears to me there are also three primary professional rules.

These are really attitudes of mind. I am not trying here to rewrite the Codes of Conduct for solicitors or for the Bar. The Codes need careful reading and you are assumed to know them. I am simply emphasising the seemingly most important *beacons of integrity* which ought to burn bright in every lawyer, and should guide the way we think.

And I think there are three beacons.

They are commandments of behaviour.

***

The first is THOU SHALT NOT MISLEAD THE COURT.

You are assumed to know this.

It is a long subject and will have been studied at law school.

Always remember, if in any doubt as to whether you are about to mislead the court, you must consult colleagues and if necessary your professional telephone help-line, which you ought to know off-by-heart, no kidding – to this day, I can still recite it.

Always consult.

Misleading the court is serious misconduct and will, and rightly should, lead to formal proceedings of censure.

***

For God’s sake, DO NOT LIE.

Even if it means you will win the case and you think no one will find out.

Don’t ever say something you KNOW IS NOT TRUE.
Ever.

And I mean EVER.

Are you listening – I said EVER.

If you tell one lie, and by this I don’t mean mentioning something which may not be true, which is unclear, but instead you KNOW it,
KNOW - KNOW - KNOW IT, no matter how small a teeny weeny lie, you should never step into court again.

NEVER EVER AGAIN.

I mean it. I really mean it.

***

Witnesses might lie. Criminal defendants often lie. But an officer of the court – and that's what you are – is upon her honour, and never ever ever ever lies. The whole system collapses if you cannot be trusted not to tell lies for case advantage. You must be trustworthy to the judge, to the jury, to your colleagues, as *without trust you cannot be persuasive*, and if you are caught out on just one occasion, no one will ever believe you again.

And they will never let you forget.

May the ground open and swallow you, may lightening bolts cascade from the Heavens, may the monsters of Hades surface and drag you down to Hell's darkest dungeon, if you do it even once.

Just don't do it.

I won't say anymore about it as it is so huge an issue, it need only simply be mentioned to make the point of how important it is.

***

The second rule however is not such a formal one. But is it pretty much just as important**.**

THOU SHALT NOT USE SHARP PRACTICE WITH YOUR COLLEAGUES.

This is a difficult area. You have a duty to the client. But equally, that duty cannot be fulfilled if you are sharp with your colleagues as they will not trust you, and this will make running your case to the advantage of the client very difficult.

We are not talking about lying here. We are talking about being nasty, evasive, weasily, too clever by half, mealy-mouthed, disingenuous, and manipulative.

At all times, ACT WITH HONOUR.

***

Generally, the trick is it is better to refuse to be drawn on what you will do, it is better to say nothing and make it clear you are saying nothing, than to say you will do one thing and then do another.

If you say you will do something, then do it; if you say you will not do something, then do not do it.

If you wish to raise a matter of law, give your opposition at least some notice. If you have legal authorities on which you will rely, alert the opposition early, not at the moment of submission.

Maintain POLITENESS AND CLARITY.

A rule of thumb is *it is best to deal with your opposition, as you would want them to deal with you.*

It is often a question of *how* it is done, not what is done.

***

Be Henry V not Richard III.

And if you don’t get it, they’re plays by Shakespeare - look them up.

***

So, why not confound the opposition?

The answer is clear. As advocates, we spend our working lives together. Clients usually come but once or twice. However, we encounter each other all the time. It is professional suicide to have a reputation for being sharp. Reputation travels quickly. Lawyers love to gossip. There will come a time when meeting a new advocate, we see eyes narrow, and inexplicably co-operation is withdrawn. Sadly they have heard about us.

In Britain and Ireland, and most of the Commonwealth and Common Law world, we rightly pride ourselves on the level of co-operation between advocates against each other. Outside the courtroom, decisions are taken which speed up the smooth running of trials and allow the parties and the court to focus quickly on the real issues.

Long may this continue.

Don't blow it by being sharp.

***

And by working together on the issues, without being thought a cheat, actually your opposition will often assist you - up to a point – and this means you will present your case more effectively. There is a sort of *chivalry* afoot where, as knights in legal combat, we give each other a sporting chance, which allows your best points to be advanced, rather than to be bogged down in robing room squabbling.

And if the tribunal sees you are fair-minded in how you deal with your opposition, to its mind you become more reliable - and if reliable, it will give you its ear – and of course, if it is inclined to listen to you, then you can be more persuasive – which is what you are paid to be.

***

Please don’t confuse this with selling your client out to keep in with your lawyer friends. This is not what is being suggested.

Your duty to your client is paramount, but remember, it must be within the rules. The rules require that you do not mislead the court. In the same way, there is an unspoken rule that you must not deliberately obfuscate your colleagues.

Don’t lie. Don’t u-turn on what you have promised, without very, very good reason - which you must then explain fully. Don’t say things intending to renege on them later.

As I say, act with honour - it is better to say nothing, and point out you are saying nothing, than to say something you later deviously change.

***

The third rule is this: THOU SHALT ALWAYS TRY TO THINK LIKE THE TRIBUNAL, not like the client.

Why? Because if you do this, you will automatically become less partisan.

Being perceived to be less partisan is really very important. You will become more reliable in the eyes of the judge or jury and your later arguments are more likely to succeed.

There is all the difference in the world between representing someone and taking sides. Your job is to represent, with caution – your job is not to shoot ‘em up not in the style of a hired gun in bad b/w B-movies.

***

You should try to take decisions with this thought in mind:

What will the judge think she should do about this problem?

Or

What is the jury likely to make of all this:
of the general circumstances of the case,
or demeanour of the defendant,
or the presentation of his mother as a character witness?

The thought should not be:

What do I want the judge to do?

nor is it

I wonder if I can get this past the jury?

nor is it

I'll have a go.

Or another way of looking at it is ask yourself:

If I were the tribunal, what would I think?

***

Let’s ask it again:

IF I WERE THE TRIBUNAL, WHAT WOULD I THINK?

The question is not: what would the client like me to have a go at.

***

The thing to avoid here is trying to think like the client. You are paid to predict and influence what will happen in court. Whoever it is, be it a burglar, the local constabulary, a multi-million pound business, the client wants you to think for her. And she wants you to work out what will best serve her interests while she lies in the power of the court.

However, there is sometimes a tension created by the client appearing to tell the advocate what she wants done in court. Remember, without becoming arrogant, you will usually know what is best for the client if you can develop an understanding of how the tribunal thinks. If we all did everything clients insist upon, court could descend into a circus.

Your job is to straddle the fine line between pleasing the client and pleasing the court. Pleasing the court will usually benefit the client. Do not roll over, but at the same time do not undermine the entire courtroom process by becoming the unthinking mouthpiece of a difficult or inexperienced client. If you can anticipate the way the tribunal is thinking, you can craft so much of your presentation to meet its expectation, soothe its concerns, and be persuasive.

You are the one with the training. Don’t forget it.

***

If we follow the rules, then within their constraint, it is your job to win.

The constraining rules are the rules of law and evidence, the codes of conduct, and the rules of advocacy. You're assumed to know the rules of law and evidence. You're assumed to know the codes of conduct. But you'll be learning the rules of advocacy throughout your whole career.

So, within those rules, it is your job to win.

But not at any cost.

You must keep the three beacons burning – don't mislead, don't be sharp, always try to think like the tribunal.

And with them burning, now you must fight your case. And really fight it.

Simply detachedly presenting the case is insufficient. An advocate must try to be totally committed.

Of course, we may lose in the end, but it will be fearlessly, bright-eyed, and not for want of trying.

***

And remember - there are some who will say expansively with an easy smile they are not interested in winning, but just in presenting the evidence. It is a fashionable thing to say. It makes them seem harmless.

Don't believe a word of it.

***

Chapter 5

Tribunal Psychology

A tribunal has power.

The power of decision.

It decides who wins.

You don't.

The decision is not yours to make. It belongs to the tribunal. And it will jealously guard its power to decide. An advocate must always avoid appearing to instruct a tribunal on what decision to reach.

Instruction is completely wrong.

Our job is not to *tell* it what to think;

Our job is to *show* it what to think.

The difference between telling and showing is gargantuan.

***

People who tell, instruct.

People who show, assist.

No one likes being told what to do.

But everyone likes ASSISTANCE.

Advocates should try to ensure the tribunal sees them as assistance. It is much easier to persuade people who believe you are helping them.

Avoid being seen as a gladiator. It is difficult to persuade people who believe you are locked in a contest with them. Be wary of being seen to be against the judge, or the opposition advocate, or the witnesses: that is how you become seen as a gladiator.

Of course you are for one side or the other and trying to win within the rules. But try not to let it show. Keep the word ‘assistance’ at the forefront of your presentation to the tribunal.

***

The word assistance goes further. We should project the notion we are a FACILITATOR.

A facilitator is an advocate who makes it easier for the tribunal to agree with our case.

Imagine yourself as a guide. We show the tribunal the way home. We facilitate its journey. We make it easy to follow our route.

Instead of standing in front of the audience, eyeballing it, confronting it with our view, we stand alongside it - notionally with an arm around its shoulder, showing it what we suggest, respectfully, it might agree makes sense. We help it to decide, rather than get in its face.

***

Another word to have at the forefront of your mind is this,
unquestionably this,
undeniably,
irrefutably,
hugely,
this *wonderful* word:

IRRESISTIBLE.

Make the route by which you guide the tribunal home *irresistible*.

Make it so that they cannot help but willingly and happily agree with you.

Always, always, always look for a quality of irresistibility in your arguments. It is the hallmark of a truly great advocate.

It cannot be emphasised enough.

A great advocate is not one who argues loudly and with noticeably great intellect. Rather, he is the one who says things which just seem right.

Simple. Easy. Just plain right.

***

It is as if the advocate is not there. There is only the argument. And the answer to the argument should seem obvious.

In this way, the advocate is invisible, behind the argument.

INVISIBLE.

But of course the answer was not obvious, until the invisible advocate offers an argument which was utterly irresistible, and makes it look as if there was never anything to argue over in the first place.

And that takes skill, real skill.

***

Make the argument IRRESISTIBLE.

Be INVISIBLE, behind the argument.

YOU ARE NOT A GLADIATOR.

NEVER FROGMARCH THE TRIBUNAL – instead, QUIETLY SHOW THE WAY.

***

Don't forget it!

If you can pull off being invisible, irresistible, and show the way, you will be so good they will erect a statue to you.

***

Ok, this is stuff I just don’t want you to miss.

So I am going to repeat myself – sorry – this is where I start driving you nuts.

I’m trying to drill these very important thoughts into your mind.

Some people think being an advocate is about pushing, about forcing everyone to agree with you, whether they like it or not.

It is not about that at all.

As I say, don’t push.

Coax the tribunal, invite it, but never demand.

If you push, it will probably push back – think about it – it is what happens in a pub if you push your point down someone’s throat.

***

Here is what happens in the tribunal's mind as you pontificate:

I say…

- *Who cares what you say…*

I think…

- *Who cares what you think…*

You must agree that…

- *Oh yeah, must we…?*

You will find the defendant guilty…

- *Not so fast, counsel, not sure we like the way you put that…*

***

Cloak everything as an INVITATION. It amounts to pushing your case, but so much more effectively because it does not *look* as if you are pushing – instead, it makes it feel to the listener that you are merely expressing what they think anyway, to which folk are always so much more receptive, even if they do not know yet what they actually think.

It may be you think…
- *Yes, maybe I do…*

It may be you agree…
- *That sounds about right…*

It is my invitation to you to find him not guilty…
- *Nicely put, we'll think about it favourably….*

***

Never forget about LOSS OF FACE.

Tribunal loss of face. Not yours. Your pride is expendable.

Do not embarrass the mind of the tribunal - *always allow an escape route for the tribunal to save face.*

If you seek a favourable ruling on a matter where the judge has already given preliminary indications on how the judicial mind is working, then be aware he may find it difficult to agree with you if your application embarrasses his previous thinking.

This is only human nature. Tribunals are human too.

***

Provide ESCAPE ROUTES.

It may be that a new piece of evidence can be proffered as the reason to change the judicial mind.

Or that an argument can be revisited as you failed to identify a relevant authority.

Or maybe just say you have been clumsy in your submissions, and would invite a further opportunity to put a point – and if the tribunal now changes its mind, it can think the problem earlier was you, not it, so you can win without loss of tribunal face.

This is all much much better than simply asserting the judge is wrong.

***

If, as sometimes happens, a view has been expressed by the judge before you have addressed the court, then be very quick to BLAME YOURSELF.

Tell the judge you apologise for not having raised the matter earlier, or were not fully concentrating on events - whatever, as long as you provide that all important save-face mechanism so that the judge can change his mind without looking as if there has been a judicial u-turn.

Don't take them on. You'll lose. Assist them.

Don't fight them. Everything is your fault - never theirs.

And blaming yourself is not weakness, nor cowering, nor obsequious - it takes strength, and confidence, and fearless integrity.

***

So let me talk here about INTEGRITY.

The OED says integrity is ‘the quality of being honest and having strong moral principles’. To be effective in court, you must be thought to have it, even if your private life’s a mess. If you follow the rules, and are seen to help the court, rather than to dissemble and be pushy, then it comes naturally. And the consequence is that a tribunal will give you its ear. And if you have its ear, you have an opportunity to persuade.

***

So we have the ‘3i’s:

INTEGRITY
INVISIBILITY
IRRESISTIBILITY

These are the hallmarks of greatness.

Go after them.

***

And while I think about it, drawing these three chapters together, we also have the ‘3t’s:

TRUTH
TEST
TRUST

An able advocate realises his job is not so much about the *truth*, but about the *test* to be applied to the evidence, from which the system assumes the truth will emerge - and to be effective in persuading the tribunal whether the test has been met, he requires the *trust* of the court.

And to receive that trust, to come full circle, the able advocate requires
integrity,
invisibility,
and irresistibility.

***

There you have it.

You are not trying to be a tub-thumping gladiator, shouting your head off.

It's not about you and your ego – you are irrelevant.

Only make your presence and personality felt, but never your pugnaciousness, when you absolutely know you are winning – otherwise, keep 'you' in low profile – it's the common sense argument that wins, not a flamboyant strutting performance.

So, to get ahead in court, follow the 'threes':

The 3 Beacons
The 3t's
The 3i's

With the 3-3s we can persuade.

Now let's talk more about persuasiveness?

***

Chapter 6

Persuasiveness

Advocacy – which is your job - is the skill of persuasion.

Your job is to persuade the tribunal of your case.

Not to shout at them.

Or moan.

Or complain.

Or be terribly clever.

Persuade.

***

What is persuasiveness?

How do we measure it?

Are there techniques to improve it?

***

Here is my suggestion as to what is courtroom persuasiveness?

An advocate is persuasive if the tribunal prefers her case when weighed against the burden and standard of proof.

Let’s say that again.

AN ADVOCATE IS PERSUASIVE IF THE TRIBUNAL PREFERS HER CASE WHEN WEIGHED AGAINST THE BURDEN AND STANDARD OF PROOF.

Notice persuasiveness is not simply where her case is preferred.

Right at the core of persuasiveness is the burden and standard of proof. A jury may prefer a prosecution witness, but cannot be sure beyond reasonable doubt; they may prefer the prosecution case, so that they think it highly probably right - but with the burden on the prosecution to prove the case so that they are sure, not of what is highly probable, in the final analysis it does not matter who the jury prefer - the defence still wins.

***

So an advocate must firstly IDENTIFY TO WHAT STANDARD MUST THE TRIBUNAL BE PERSUADED.

In crime, for the prosecutor, her case must be beyond reasonable doubt. For the defence, her case must simply be reasonably possible.

Advocates are often heard talking to each other about cases, and it is clear no one is thinking about the burden and standard of proof. Prosecutors sometimes say their case is clearly the more obvious explanation. But is it the only explanation? That is the real question. The defence sometimes worry the jury will find it hard to believe the defendant in evidence. But is the jury *sure* she is lying? That may be the real question. And remember, it is more difficult for a jury to say they are sure someone is lying, than for them to say simply they find it hard to believe her, which often is not the same thing.

Think about this.

***

In how many speeches have we heard a prosecutor invite a tribunal to consider that an injury is consistent with the allegation of a punch. Yet the more precise issue is whether the injury can *only* be explained by a punch.

Is it equally consistent, as the defence suggest, with a blow from tripping over?

Or even, is it merely *possibly* consistent?

Is it enough to persuade the tribunal if the prosecutor simply says the injury is consistent with her case?

No.

***

How is persuasiveness measured?

By getting the tribunal to
REALLY,
REALLY,
REALLY
THINK ABOUT YOUR CASE.

Advocates cannot win every case.

Some are just bad cases, spoiled by bad witnesses, where it is pretty clear no one can be relied upon.

Some cases are won without the tribunal having to give it much thought - lawyers often say these cases resolve themselves and that advocates were actually unnecessary.

But most cases do require advocates to be persuasive. What may seem obvious can be turned upside down by a persuasive advocate, because she persuades the tribunal to ***really, really, really think*** about her case.

***

Do not believe advocates when they say they do not think they have much influence and everything depends on the witnesses - they are either being modest, or they are not very good.

Skilful questioning and a well-planned closing speech can turn the world on its head.

Or at the very least, it will get the tribunal to really, really, really think, which is the minimum you seek.

***

As for techniques to improve persuasiveness, there are many.

They can be learnt.

Generally, but not always, they work.

***

We start with PERSONAL PRESENTATION.

Every advocate is a salesperson, selling a client's story. This may sound unattractive. But it is true. And what is worse is very often the story you have to sell is seemingly unsellable. So you have to be a very good salesperson - not just any old salesperson.

There follow some mindlessly obvious suggestions, which although obvious, are often ignored. They should not be.

***

DRESS WELL. Obvious isn't it.

Neat hair, dark clothing, like for a job interview - or to meet the Queen – after all, that’s what you are doing, you are going to Her courts.

Do not get slack about your appearance. Every day you are on show. So show them. Make sure the clothes you wear make you look formal and fantastic.

***

Looking fantastic makes you LOOK LIKE A WINNER. Tribunals cannnot help themselves - they take people who look like winners very seriously. And you have not opened your mouth yet. This is elementary human psychology.

There is something else mindlessly so obvious you will grin - wear expensive polished shoes.

For inexplicable reasons, expensive polished shoes carry serious weight. People often look down during negotiation, when talking with clients or the opposition, probably to avoid appearing threatening, and when they do so, they see each other's shoes. It is surprising how often shoes are remembered, particularly if messy.

And if neat, they say ‘I’m on top of my game’, and may often have the effect of making the other person doubt themselves – which is usually what you want, and you’re already winning.

***

My polished shoes suggestion from the first edition has raised a touch of mirthful feedback, but I really do stand by it. I have never forgotten from being in the school play that line, I think, from Arthur Miller's 'Death of a Salesman': *With a smile and a shoeshine, the whole world is yours.* He's basically right. And he married Marilyn Monroe, so he must know a thing or two.

White or light shirts are preferred. Too much colour and you will give the impression you fancy yourself (which you may do - most lawyers do, but you must hide it). If a tribunal thinks you fancy yourself, it will often instinctively turn against you.

So now you look like a winner.

Behaving like one comes next.

***

The most important person in court, besides the judge is of course the usher.

THE USHER.

The usher controls the list and will usually decide when your case will be called on. If you are rude or high-handed, not only will your case slip to the back of the list, but the opinion of the usher on your behaviour often gets reported to the clerk of the court who may report it to the judge as part of the courtroom gossip that inevitably is generated where there are people, personalities, and pressure. You don’t want your judge thinking ill of you before she has even seen you.

The skills of advocacy begin not when the tribunal sits. They begin when you arrive at court. In everything you do, you are on show. You are on show to the client, to the clerk, to the public, to the usher. If you look like a winner, remember to behave well, and not like a prima-donna.

And what you need next is very important.

***

POISE.

***

Poise. Poise. Poise. Poise.

***

Always remember poise.

Maybe I am overdoing the poise thing. I’m trying to get you to remember it above many of the other things I am saying. It is very important. Carry yourself meaningfully and DO NOT BE AFRAID TO OCCUPY SPACE in the courtroom.

Your movements should be purposeful.

Hold your head up.

Do not let your head sink into your chest, your body sliding into smallness, forward on the seat, so that you occupy less space, look bored, and appear to be a sloth.

Just holding your head up makes a huge difference. Whether leaning on elbows, reclining a little in the seat, addressing the tribunal, whatever - with a head held up, you will look attentive and in control. Obvious isn't it. And you still have not opened your mouth yet.

***

FIDDLING comes in many forms. Avoid it. Don't play with pens. Try not to doodle - even though the urge can sometimes be overwhelming - someone will spot you.

Don't pull at your suit while addressing the tribunal.

Don't rock backwards and forwards while seated or upright.

Don't shuffle papers while talking - it is irritating and will only mess up your bundle.

Many of us are unaware of fiddling, but it is obvious to everyone else. Ask your opponent if you might be a fiddler, and be prepared for an embarrassing but ultimately extremely helpful criticism.

Even better, video yourself at home, making some speech – we've all got a camera on our phone these days – set it up - see if you aren't amazed. Go on - try it.

***

HANDS should not be in pockets as this looks too casual. Put them behind your back. Or put papers in them, or papers in one and a pen in the other, or papers in one and the other behind your back. Or wind your gown behind you into one. Or put them both on the lectern.

Just don’t put them in your pocket.

Hands are a nuisance. They become barriers. We hide from the witness or judge, by putting them to our face, under our chin, folded across our chest, even to our mouth, to our earlobes, scratching our noses – yes, this is hiding – it is creating a barrier between our face and senses, and our audience, and is a form of self-effacement - as if playing pee-po, covering our eyes, or near our eyes, like when tots, as if to say *if I can’t see you*, *you can’t see me*.

So, when we fidget, our body language speaks, unknown to us, directly to the tribunal.

Generally, our uncontrolled hands say unpleasant things. They can suggest embarrassment, perhaps lack of faith in the case, and weakness. And so then we are ignored by the tribunal.

No, No - NO - stand up straight up, head held up, hair neat, dressed well, hands controlled – and *relish the space you occupy* - to enjoy the attention of the entire court.

***

If you have to fidget to relieve the tension, furiously *wriggle your toes*.

Crazy but true.

It is unseen, requires considerable effort, and uses such concentration that there is no room left for your brain, while addressing the court and wriggling toes, to indulge in visible involuntary fiddling.

Daft as it may sound, this really is a tiptop tip.

***

Like I say, DON'T HIDE.

It is easy to scrunch up over a lectern, or allow shoulders to bend forward, and for the head to hang, while addressing the court.

What you are doing, again, is hiding, though differently from pee-po-face-fiddling.

This time, you are trying to occupy the smallest amount of space, like you are squeezing yourself into a little hole in which to hide away.

You are showing you are afraid.

Whether you are afraid or not, don't show it.

Let’s say it again: RELISH YOUR SPACE.

Think to yourself: *I will stand like a rock, and let the winds blow and the seas foam all about me, but I shall stand*. If done right, this is not arrogance. It is simply being solid.

***

Now here is something very important indeed. You must MAKE EYE CONTACT with the tribunal.

Be the tribunal lay magistrates
or a district judge
or a circuit judge
or a jury
or the High Court
or the Court of Appeal,
or the Supreme Court
or God herself…

MAKE EYE CONTACT!

This cannot be stressed enough.

So let's trumpet it again: *make eye contact*.

Look at your judge. Look at each member of the jury.

***

Many advocates look down, avoiding eye contact, particularly with judges.

But judges are people too.

Talk to them, rather than to your notes. Advocacy is not some intellectual abstraction: it is about persuading people.

No one ever persuaded anyone of anything by talking down at the floor.

So if it helps, hold your notes close to your head, at chest height, rather than leaving them on the bench so you can occasionally hide by looking down. Close to your head, you can glance at them, follow them, and yet maintain regular eye contact, so that the dreadful hiding thing is minimised.

And of course by holding your notes, you have something to do with those damned hands.

And if intimidated, look at the *third eye*, which is the spot just above between the eyes of the Judge – this is a cunning little ploy - she will think you are mostly making eye contact, and so engage you, while in fact you are safely not, and may feel more comfortable.

***

When speaking, SPEAK FROM YOUR LUNGS, not from the back of your throat.

The voice is more powerful from the lungs and carries further, without sounding as if it is a shout. Also, the voice is DEEPER**.** Deeper voices sound more persuasive - why, is a mystery, but they just do. Tinny, light voices can sound plaintive, weak, sometimes desperate, appear to be shouts, or squeaks, sound out of control, and finally and most importantly, are difficult to listen to, and so in the end they can be ignored.

A deeper voice is also naturally SLOWER in delivery. This does not mean it proceeds at a snail's pace. Rather it is simply easier to consume and understand its content. Just how slow is good will be a subject for later, but for the moment, as a general principle, slow is better than fast.

***

Leaning forward at 84.5 DEGREES to the perpendicular was once said as a comic aside to be the optimum angle at which to stand to be the most persuasive.

***

Funny or not, it is true.

84.5 degrees**,** or thereabouts.

If you stand bolt-upright at 90 degrees, the impression can exist you are leaning backwards. Or standing somewhat aloof.

However, leaning slightly forward conveys a wish to engage the tribunal, while appearing solid, dispassionate, with a firmness of purpose about your address: we look like we believe what we are saying to be correct, are sensible and reliable, and really want what we are saying to be fully understood.

This may sound the weirdest suggestion you have ever read.

It probably is.

But it works.

Try it.

***

So where are we?

We have not opened our mouth yet, but already we have the court's full attention:

we dress well,
keep our head up,
do not hide,
we have control of our hands,
we move purposefully,
unseen, we wriggle our toes - and no longer fiddle,
our voice is a bit deeper and slower,
we have eye contact,
we stand like a rock,
at the optimum angle.

We look CONFIDENT. We may in fact be worried, feeling awkward, and uneasy. How we feel does not matter, as long as we don't show it.

Feign confidence.

And the techniques applied so far will help do just that.

***

So right now, the tribunal has the impression we will be persuasive.

We’re looking good.

Time to open your mouth.

***

PERSONALITY comes next.

Once you open your mouth, people quite deliberately start forming judgements. Quickly.

Please do not try to be someone you are not.

Advocates need only remember the rules of law, evidence and conduct, good manners, and at all times deference to the judge.

Within these constraints, BE YOURSELF.

There is no need to change your accent. If you normally gesticulate, within reason use gestures where helpful. Vary your tone and pace, just as you would in conversation.

Project yourself, not just the case.

***

This is an area which often troubles advocates. On the one hand, a court is not a coffee morning, ripe for cheery chat and easy banter. But on the other hand, all around you are real people. Real people relate to each other through their personalities. A court will best relate to you through yours.

Advocacy is not a science - it is an art. It does not work to hide our personalities behind passionless question structures, and carefully prepared legal submissions. A correctly phrased question to a witness, if delivered boringly and in a monotone, will usually have nothing like its intended effect. So much more is communicated by you as a person than by simply what you say: people look at how you say it, with what tone, with what expressions, and with what body language.

***

Try listening to an argument with your eyes closed.

It is immediately apparent that quite a lot of vitality is lost - but at least you have tone to consider.

Now try listening to a computer - as they can now do - speaking in monotone - with your eyes closed.

It is a nightmare.

A case is not just about witnesses and the evidence.

It is also about you.

You are speaking for someone.

If you try to be somebody you are not, you will lack credibility. And without credibility, you cannot be persuasive. So be yourself.

This means, project yourself through variation of the tone of your voice. VOICE VARIATION gives you personality and makes it easier to listen to you.

You want to be easy to listen to – as yourself – with your own accent.

***

If you’re paying attention so far, the tribunal will by now be listening to you easily and carefully.

Now we come to a very difficult area in the art of persuasiveness - BEING LIKED.

***

If it is possible,

and it is not always possible in some cases,

an advocate should try to be liked by the tribunal.

People are more sympathetic to those they like: it is human nature. With a sympathetic hearing, there is more opportunity to be persuasive.

Being liked by your opposition is quite helpful too: it is easier to plan out the case together, to avoid sudden surprises, and occasionally to persuade your opposition to agree evidence which will be to your advantage.

However, being liked is nowhere near as important as putting you client's interests first.

If there is a conflict between being liked and your client's interests, then put your client's interests first.

Let’s be clear:
NEVER, EVER, EVER PUT BEING LIKED AHEAD OF THE CLIENT'S INTERESTS.

***

EVER.

This may sound obvious, but it can be difficult in practice. We can be intimidated by senior opposition or a difficult judge. The unspoken suggestion may be that we should roll over and play dead if we want to remain friendly. The suggestion may even be we cannot be any good as advocates, unless we concede some point, which surely is obvious to someone with real ability.

Be very careful.

You now need JUDGEMENT.

Judgement is what you are paid for. You must have this if you are to be any good. It is your greatest necessity as a lawyer. Whether you have it or not is usually a question of talent, feel, common sense, understanding of the law, experience and occasionally cunning. It cannot be taught.

***

We must each have the confidence to form our own judgements on issues.

We must each have the talent to get it right more often than not – like I say, I cannot teach you talent - but I can teach you to check for the views of others – read on.

Each advocate can be (and usually is) different on the precise view to be taken on some point. If in your judgement a point must be taken, listen carefully to your judge, listen carefully to your opposition – above all, consult others - but if your judgement remains the same, and you risk not being liked for it, follow your judgment not your popularity.

***

This is the cornerstone of what being a lawyer is all about:

FOLLOW YOUR JUDGEMENT, NOT YOUR POPULARITY.

***

Of course this is obvious, but it can be very difficult to do sometimes.

It takes courage.

Advocates need courage in abundance.

The question then becomes: when is your judgement good and when is it bad?

It is never a mistake to consult other advocates not connected with your case. This is one of the greatest strengths of the robing room at court, and of being with other advocates in chambers or the office. So ask around.

***

ASK AROUND, d'you hear!

But be sure to explain all the relevant details. Another's opinion on only half the facts can be more than useless: it can be dangerous.

You have to develop the faculty – this is really important, heads up - to tell another *concisely <u>all</u> the issues, accurately, and fully*, *<u>including</u> the stuff you may have done wrong*, in order to get good help.

You may need to practise this – it goes against a natural instinct to be self-defensive - it is important to accept being WITHOUT ARMOUR in this type of robing room discussion - it is not an opportunity to show off to others, or swagger about with sword in hand, or to slew things nicely in your favour – you have to offer your circumstance, warts and all, to a colleague – honestly, openly, fairly.

You have to make the best points for the other side, and point out why they may damage your own case – you have to show you can see the case from the point of view of your opposition – you have to think like the tribunal, not like the client – we've talked about this before – and above all, you have to listen very carefully to the advice given, and not argue with it – instead understand it, weigh it, explore it.

If you can do this, explore the issues, without armour, seeing things from all sides, than you are being a proper advocate.

***

Having asked around, there will however occasionally still be times you are unpersuaded by everyone else, and you must still take the point.

Oh dear, you won't be liked.

In that case, you must ENSURE YOU ARE RESPECTED.

***

An advocate who is not respected is an advocate without credibility. Without credibility, we are unpersuasive.

The quickest way to lose respect is by being quarrelsome with the judge, or with the opposition, by taking mindlessly dull points which the robing room has sternly warned against, by being high-handed with witnesses, condescending to juries, pointed, irritated, arrogant, slightly sneering, and pompous.

Strangely, this really does happen.

Always guard against it. It can sneak up on you, unawares.

***

To maintain respect, it is only necessary to remember two things:

DEFERENCE to the judge and

POLITENESS at all times - and to everyone.

Good manners are not weakness. Shakespeare – there's the great bard again - said *manners maketh the man.* They are attractive and generally get you liked.

The reason they work so well is manners make the other person feel comfortable with you particularly when disagreeing – so, remember them – and if you don't have any, learn some – being rude and pushy is not good advocacy, fullstop.

Deference is not weakness. In the face of heavy weather from a difficult tribunal, deference is the only way to proceed. There is no other route.

So - NEVER BECOME ANGRY WITH YOUR TRIBUNAL.

It may make you feel good, but you will lose.

You may think you have every justification, but you will lose.

***

If you fight your tribunal, someone must lose face. Unfortunately the tribunal will always have the power to decide who that should be - and it will always be you.

However with deference and politeness, no one need lose face, and it becomes so much easier to win the point, and so to turn slowly, slowly, the enormous and seemingly unstoppable seatanker which is the tribunal's mind, if by doing so, no one is embarrassed.

Turning seatankers is not easy – but it can be done. In court it is done with politeness, not with tub-thumping. If you tell a seatanker it is wrong, it will keep sailing at you, and as you are only a dinghy, you are in trouble, even if you are right. So, as we discussed before, always look for a way to make a point without making the tribunal lose face.

***

If you SAVE THE FACE OF THE COURT, you retain the respect of the court.

If you cannot be liked, make sure you are respected.

You will not be respected if you shout at the tribunal.

A respected advocate, although sometimes not popular, is a credible advocate.

And a credible advocate is a persuasive advocate.

A shouting advocate without respect is useless.

***

Another way of looking at guarding respect is this:

DEMONSTRATE YOUR COMPETENCE TO THE TRIBUNAL EARLY ON.

If you are thought competent early on, then you can even make some mistakes and not lose respect.

Find a way of demonstrating your competence.

Actively look for one.

Something easy.

And early on.

Show the tribunal you know what you are doing, with something uncontroversial. It might be timetabling for the case. It might be a list of the legal arguments that are to come. It might be correcting a spelling in the papers. Whatever it is, get some credit in the judicial bank with something helpful.

***

When you do open your mouth, KEEP IT SIMPLE.

Simplicity is more persuasive than big words, long sentences, multiple clauses, conditional subjunctives and other features of verbosity. This last sentence proves my point. It is too long.

Keep it simple. A simple sentence is short. It can be immediately understood. A tribunal cannot be persuaded unless it understands you. The most complicated cases, or the most scholarly ideas, can generally all be reduced to simple sentences. All that is required is forethought.

***

Lawyers can be truly terrible for big words. It is as if we feel we must demonstrate all our professional expertise, all our learning, and just how clever we are, with a giant vocabulary.

We have spent years learning about things like *mens rea, actus reus,* maliciousness, recklessness, appropriation, subjective foresight, the balance of probabilities, and so the list goes on. These things are usually meaningless to juries and civilian witnesses. Avoid their use, except of course with the judge.

But even with the judge, only where necessary.

Find other ways of explaining what you mean as if sitting with new friends over a polite Sunday lunch. Do not condescend and show off.

A good tip is to imagine your audience is a class of intelligent 15 year olds who are all doing well at school – pitch to that level, not to a professor, and you will naturally try to simplify what you say, which means you will be easily comprehensible - and if easily understood you are likely to be more persuasive.

It is not insulting to try to simplify, even for the Court of Appeal – but it can be insulting to overcomplicate with big words, and then give the impression your audience is too stupid to understand you – which it isn't, it's you who's too stupid to simplify – so like I say, think 15.

***

Police officers often colour their language with odd stock phrases, designed perhaps to convey the impression their evidence is more measured, sounds more scientific, is more carefully researched, and therefore should perhaps carry more weight.

For example, they proceed in northerly directions on mobile patrols, instead of driving down the road; they disembark or alight from their vehicles, instead of getting out of their cars; they give chase and apprehend suspects, instead of running after people and catching them.

These expressions can sound dull.

They can confuse tribunals, and particularly juries.

***

So avoid the big words and just TELL A STORY.

Stories are not told with vehicles proceeding in northerly directions. Bring out the human dimension - the thrill of the chase, the struggle of the arrest, the speed of the cars, the shouting, the swearing, the excitement of finding a weapon…

To put it another way, GIVE IT LIFE.

***

And BE BRIEF.

***

We often feel we should keep talking to earn more money. Don't.

Do not pad out a submission or a speech or a cross-examination just to give the impression you are trying hard. You will be written off as a waffler.

Keep it simple. Give it life. Be brief.

***

At this point, we have the stuff of persuasiveness about us.

We are well dressed.
Our head is held up.
We do not hide.
We have control of our hands.
We move purposefully.
Our voice is a bit deeper and slower.
We have eye contact.
We stand like a rock.
At the optimum angle.
We are ourselves.
We do not try to be someone we are not.
We project our personality into the case.
We seek if possible to be liked.
At the very least, we jealously guard respect.
We are polite to everyone.
Always.
We are deferential to the judge.
Always.
We check our judgment against the views of others.
We keep what we say simple.
We keep it brief.
We give it life.
And… here I go again… what we say should be IRRESISTIBLE.

***

It has been mentioned before, but it should be mentioned again - yep.

IRRESISTIBILITY is the ideal point at which to conclude persuasiveness, even if it seems repetitive, as the last chapter dealt with it too.

Irresistibility is the hallmark of the truly great advocate.

I cannot, cannot, cannot stress it enough – along with eye contact earlier.

An irresistible argument is just that - an argument which is irresistible.

It is the apex of persuasiveness.

The tribunal cannot fight it.

It sweeps them happily, effortlessly, to your conclusions.

No tribunal will accept a suggestion which is esoteric, contrived, or too clever by half, nor any idea which is thrust upon them.

***

To be irresistible, an argument is four things:

REASONABLE, not emotional – there's no heat in it,

ELEGANTLY DELIVERED, and

COMMON SENSE.

And fourthly, to be the three above, it requires careful PREPARATION.

Think PERC – prepared, elegant, reasonable, common-sense – to misspell perk, it is a 'perc' of the job to reach this zen-like understanding of the true nature of persuasiveness .

Remember - sorry to bang on about it - an irresistible argument is one which seems obvious, and is delivered in a manner which makes the advocate seem incidental, as if almost not there. The cunning feature of the irresistible is that it appears no persuasion techniques are at work.

Oh, but they are - ye Gods, they are!

The techniques are just hidden by careful word choice and skilful, measured delivery.

***

To be irresistible, there is no need to pontificate as if delivering some fine 1930's oratory.

Court is not war.

For all the law and rules of evidence we learn, for all the learning we apply, the most persuasive feature of any case is if it accords with *common sense*. If you can find the common sense position in any argument, then you have the beginnings of something irresistible. You then weave around the common sense position careful words and a careful delivery.

Sometimes lawyers lose sight of common sense among all the books. Don't. The winning argument is usually the easy argument. Sometimes, lawyers think things ought to be more complicated in order to justify their years of learning. Some people actually look for the more difficult argument.

Don’t. As a rule of thumb, *if it feels difficult, it is probably wrong*. The simple argument is often right, precisely because it is simple, and if it is simple, it can be understood, and if it can be understood, it can be persuasive.

So, THE IRRESISTIBLE ARGUMENT IS USUALLY THE EASY, SIMPLE ARGUMENT.

***

Let’s think math for a moment.

A persuasive argument is an irresistible argument.

Persuasiveness = Irresistibility

Here is a persuasiveness formula for all advocates to contemplate:

$$\frac{(\textit{Preparation} + \textit{Judgement} + \textit{Common Sense})\ (\textit{Advice} - \textit{Armour})}{(\textit{Eye Contact} + \textit{the Optimum Angle})} = \textit{IRRESISTIBILITY}$$

Let’s call this is *Morley’s Law*.

***

You want your presentation of both self and of argument to be constrained within four boundaries, like they are the lines of a square.

The boundaries are:

Judgement

Irresistibility ! *Invisibility*

Common Sense

You want to be the exclamation mark, right in the centre, perfectly balanced between these four lines.

Let’s call this is *Morley’s Square.*

***

How often have we read in the law reports, in sometimes long and complicated cases, the apparently simple and irresistible judgments of the great Lord Denning, and said to ourselves, ‘that's obvious, it’s common sense’.

The great thing about Lord Denning is how, through simplicity of expression and a healthy dose of common sense, he always looked obviously right, and it was only careful analysis by the House of Lords, now the Supreme Court, which could find flaws in his arguments. You want to be like him.

One can only imagine he must have been devastating, *absolutely devastating*, as an advocate.

***

Chapter 7

Case Preparation

In crime, everything starts and ends with the charge.

The charge may be in a summons, or it may be a count on an indictment.

Before you do anything else, find out what the charge is.

As crime is my area of practice, we will proceed with preparing a criminal case. But in civil cases, the pleadings are central - before you do anything, read those.

Don't think for one second that principles in this book do not apply to the courtroom in civil work.

You'd be way wrong.

So we'll work with crime. And I hope the civil people can join in.

***

A brief lands on your desk - thump. It is for the Crown Court.

Don't mess about with witness statements, unused material, correspondence, photos – or even your instructions. None of these things just yet.

GO STRAIGHT TO THE INDICTMENT.

It will tell you two things:

WHAT MUST BE PROVED

and

TO WHAT STANDARD.

Usually the burden of what must be proved is on the prosecution. Not always. Check the relevant statute. Trading standards prosecutions are examples of where the burden can lie partially on the defence. Always be aware of the burden and standard of proof.

Always.

***

The following may sound crushingly obvious, but it is surprising how often advocates do not identify precisely what needs to be proved.

It can actually be useful to write it out.

If the allegation is for example ‘assault occasioning actual bodily harm’, the issues to prove are:

Was there actual bodily harm?
To whom?
Was it caused by an assault?
By whom?
Was the assault unlawful?

Of course, there are more complicated variations on this theme for different offences, but the principle is a good one - CLEARLY IDENTIFY THE ISSUES in the indictment or pleadings – and write them out.

***

Once we know what has to be proved, we move to HOW IT WILL BE PROVED.

The answer is by the witnesses.

The case will be proved by the witnesses, not by the advocate. This may be obvious, but people often lose sight of this.

The witnesses give the evidence in order to prove the indictment. The advocates will later argue over whether the witnesses have succeeded against the burden and standard of proof.

So: witnesses offer facts, and then advocates comment on the facts.

***

Now it is time to read the witness statements.

Not before.

Because now we know what the witnesses need to say to prove the issues, we read their statements to see if they do actually say it.

Again, it is surprising how often advocates simply never apply the evidence in the statements to each of the elements of the counts on the indictment.

Do the witnesses prove the elements of each count? Look carefully at this.

Instantly we can now see every weakness - particularly if there is evidence missing. If defending, you will have identified case flaws - if prosecuting, you will need to produce an advice on obtaining further evidence.

But it is not only evidence which is missing that we notice. We also notice the sections in the witness statements on a crucial issue which are *vague - or unsatisfactory – or…well…nudgeable*. We begin to sense where the lines of attack against the prosecution case will be easiest.

***

Now read all the papers.

Only now.

Read the proofs, and correspondence, and disclosed unused material, and so on. Reading it now means you can link what you read more clearly to the issues.

As a rule of thumb, in an ideal world, read all the case papers THREE TIMES before marking them.

There is no magic in the number, but at least you will really know the case now, and any marks on the papers will be geared toward a firm purpose, rather than idle under-linings of what later seems obviously irrelevant and mildly annoying if anyone else has to deal with the case papers.

***

Once you have read the indictment,
found what has to be proved,
looked up the law,
examined whether the witnesses prove what must be proved,
read all the papers three times,

Now
WRITE
THE
CLOSING
SPEECH.

That's right. Write the closing speech.

Do it now.

***

Not at the end of the trial. Not at the beginning of the trial.

But now, way before even going to court.

Obviously, the precise words will change as the trial proceeds. But THE PURPOSE OF DOING THE CLOSING SPEECH WHEN YOU RECEIVE THE BRIEF IS IT LIGHTS UP PRECISELY WHAT YOU WANT FROM EACH WITNESS.

***

Please follow the bouncing ball here – preparing your closing speech long before court means you identify what, *in an ideal world*, you want to be able to say in the end to the jury – so, here you are, mindful of the elements of the indictment which need to be proved, you are preparing the very comments on the evidence which ideally you want to be able to offer on the elements of the indictment – having read the papers three times, you see with an eagle eye where the strengths and weaknesses lie in proving the indictment – so, with the cunning of Wellington facing Napoleon, you prepare in advance how you will emphasise those strengths and cure those weaknesses – you now have a MAP – you have identified the comments you want to make, which means you have a map of what facts you need to get to be able to make those comments – as you know, the facts come from the witnesses - so now you know who needs to say what – and more, you also know how you want to draw out the facts, in just the right way, with just the right emphasis, so that you can eventually make the planned comment – so, c'mon, keep up, keep following the ball: you now know what facts you want, from whom, with what colour, in order to make your devastating comments, prepared in advance, which ought to win the case.

***

Once you know what comments you want to be able to make to the jury at the end of the trial based on the evidence you will seek from the witnesses, it is

easy,

easy,

easy

to work out precisely what you want from each witness.

And this means that by preparing the closing speech, you find the natural consequence is that instinctively you prepare your examination of the witnesses.

Whether you will actually get them to say what you want in the witness box, through your questioning technique, is another matter for later discussion. But at least you now know what you would like them to say, and can gear your preparation toward thinking about exactly how, and with what questions, you will get them to say it.

***

WRITE THE *proposed* CLOSING SPEECH OUT.

Some people think this can be a simple mental exercise.

Not true.

Write out the points you want to make.

Succinctly.

Be bold.

***

Assume each witness will give you everything you seek: anger, inaccuracy, exaggeration, admissions of guilt, tears, agreement with whatever you suggest – imagine you will get whatever you want.

Assume the best for your case, whether prosecuting or defending.

Ask yourself, in an ideal world, what comment could there be, what evidence would there be?

Write out the points.

Reflect on them.

***

Now delete a few as being completely unrealistic - like where you are hoping the witness will confess to being an outright liar, which never happens, except on tv.

Feel your way toward what is achievable in court. Here is where you need judgement – the all-important ‘j-word’.

Write out your points again, noting how they are now focusing more keenly on what is realistic rather than what is fantasy.

Keep it real.

You have to understand people – you have to have a feel for personalities – you have to know how, to an extent, to get under a person’s skin, and wear their soul, seeing the world through their eyes, and feel their fears and prejudices – you have to have read the great works of literature, to have seen plays, to have watched good films, and been part of messy situations, either in them or observing them – you have to have a grasp of the human condition, and be more often right than wrong, in working out what everyone is thinking, and feeling, and who is stirring, and who is fair, and who is mean, and who is the victim, and who is playing, and who is lying, even to themselves – like I say, you need judgement, which is a talent, which I cannot teach you – but you can improve it, by reading, and watching, and developing the uber-sensitivity which is the hallmark of the true courtroom Greats.

So, as you prepare your closing speech, having identified what you would want in an ideal world, now ask yourself, realistically, what in the real world can I get the witness to say, which will help the case.

***

How about write out your points three times - again there is no magic in the number, but at least you now have a pretty clear idea of what you want to be saying to the jury, and therefore what you want to hear from the witnesses.

Now prepare your examination of the witnesses.

But never before the closing speech has been written.

***

So what do we now know?

If prosecuting, we know what each witness must say to prove the charge, we know what comments we want to make in our speech; and we can guess where the defence is most likely to attack. We therefore know now with what clarity, with what emphasis, with what compelling anguish, we wish the witnesses to give evidence of a material fact. And we know what is realistic.

And if defending, we know what areas to cross-examine, and we know what we want. Do we want the witness to appear a liar, or simply mistaken, or just likeably unreliable? We have identified who appears weak, where they appear weak, what answers most assist our case, what pieces of evidence to pluck from the statement and loudly emphasise, what pieces to deny, what pieces to avoid and if possible exclude, and above all, we know what not to ask in case we stupidly get the witness firming up what is already weak. And we know what is realistic.

***

With each witness, we have now identified a task. The task is this – please tattoo this on your forearm:

ELICIT FROM EACH WITNESS ONLY WHAT YOU NEED FOR THE CLOSING SPEECH.

Neither more nor less.

Hours of pointless examination and cross-examination have successfully been avoided, and our two advocates are honing like hawks straight onto the real issues.

***

Have you ever noticed how really able senior advocates actually look like hawks.

Eyes hooded,

Leaning slightly forward,

Head slightly bowed,

Each question focusing like a predator.

This is how you want to be, and you start by knowing precisely what you want to achieve during the case. And this means preparation. And preparation means doing your closing speech long before getting to court.

***

Remember, lawyers are always in danger of being very dull indeed, sometimes appearing to be creatures from another planet, with enormous vocabularies and an utter inability to say something simple.

Juries are normal people. Lay magistrates are normal people. Sometimes we can find ourselves in an ivory tower and we forget what normal people think.

We get locked up in lawyerly machinations.

Don't.

So, when preparing your closing speech, BOUNCE YOUR IDEAS OFF NORMAL PEOPLE – see what they think – are you making sense or disappearing up your own ego.

***

Ask your partner.

Ask your non-lawyer friends.

Do you think this argument in my closing speech is credible?

Do you think saying this in a speech works?

If the answer is no, find out why.

Welcome back to the real world.

***

The best advocates are those who know enough of the law, can do all the persuasive techniques, but for all that, they have not forgotten every lawyer's favourite 1950s' friend, 'the man on the Clapham omnibus'.

Never forget him. Keep him close.

In England, good jury advocates read The Sun.

No kidding.

They may not buy it, but they read it.

The paper is very much in tune with the way a lot of people think.

Keep in touch with the man who reads The Sun and sits on the bus in Clapham.

And after you have bounced your ideas off your friends, where necessary, rewrite that closing speech.

***

Ok, so where are we…

I've focused heaps on the closing speech because it defines what you do during the trial. Like I say, it’s your map.

Now I want to focus on preparing the examination of witnesses.

To do this, we have to understand the difference between FACTS & COMMENTS. You have to really get this – apologies if you’re there already, but you may be ahead of others, and I am leaving no one behind.

A witness gives a fact. An advocate makes a comment.

A fact is descriptive. A comment is prescriptive.

A fact is detail. A comment is argument.

An advocate needs a fact from a witness upon which to base his comment to the tribunal, as to why the fact means he should win the case.

No fact, then no comment.

So you want the fact to come out with just the right amount of colour and emphasis for the comment to be later attractive.

***

Let's look at an example.

You are prosecuting a burglar. *It is a f<u>act</u> from the witness that there was an observation of the burglar at 10ft for 10 seconds in street lighting. The <u>comment</u> you want to make is that the witness was therefore able to see the burglar clearly to be able to identify him, so that there has been no mistaken identification.*

It is not enough to establish there was an observation at 10ft for 10 seconds in street lighting. You want more for the comment to be persuasive.

What date was it?
5 February.
What time was it?
6pm.
Was there any light?
There was street lighting.
Was there any natural light?
It was dusk.
How dark was it?
Not that dark, getting dark.
Could you see?
Yes.
Why?
There was street lighting and it was not yet that dark.
How far was the man you saw from the street lighting?
10ft.
Why do you say 10ft?
Because I'm good at distances.
What colour was the street lighting?
Orange.
What's your eyesight like?
I was wearing my glasses.
With glasses, what's your eyesight like?
Very, very good.

How long did you see the man?

10 seconds.

How do you know it was 10 seconds?

I remember it was quite a long time.

How long is quite a long time?

At least 10 seconds.

Why 10 seconds?

It was long enough to take in everything about him and remember him.

What part of him could you see?

His whole body.

Could you see his upper half?

Yes.

What of his upper half could you see?

His chest, his arms, his face.

How much of his face could you see?

All of it.

In what direction was he looking?

Toward me.

What of his face could you see?

His eyes, his nose, his mouth, his hair.

What effect did the street lighting have on what you could see?

It helped me to see.

To see what?

His face.

How much of his face did the street lighting help to show?

All of it.

So, please describe his nose?

It was long and thin.

***

Your questions have teased out important facts from the witness, which give colour and life to the story told.

Now we have the perfect comment, based on the evidence we have teased out, which has bolstered the simple observation of the burglar's face for 10 seconds at 10ft in street lighting:

> *It is respectfully suggested there is no mistaken identification. The distance was 10ft, over a period of 10 seconds. Let's count 10 seconds to remind ourselves of how that is ample time to see and remember a man's face..... Remember how the observation was long enough for the witness with good eyesight while wearing glasses to observe, as he put it, everything about the burglar. Moreover, the street lighting was working, the witness has sufficiently clear recollection even to remember it was an orange colour, and it must have been working well for the witness to tell us, not merely he saw the face, but to specify he saw the nose, mouth, eyes and hair. The nose was long and thin. Think how delicate a feature is the nose - you wouldn't recall seeing that unless the lighting was good – and that you'd seen the nose clearly. There can be no doubt the witness had an excellent view of the burglar.*

***

We work our comments around the evidence we elicit. We identify what evidence we need for the comment, with what colour, with what emphasis. Therefore, we elicit the evidence to make the later comment.

We identify what facts help us, and then we go get them from the witness. There is a symbiotic relationship, fact and comment revolving around each other. But remember, one is from the advocate, the other is from the witness, and the advocate only gets enough of the one to make the other:

You get just enough of the right facts to make the later comment.

Don’t ask the witness unnecessary questions.

Understand this.

***

If you don't comprehend the importance of avoiding unnecessary questions, ask around your colleagues. You need to really understand it, as the comment you propose to make governs everything you do in court. It tells you what you ask and it tells you what you avoid.

Your closing speech,
prepared long in advance of the trial,
weaves the comment you want to make
with the facts you want to hear.

***

Like I keep saying, that proposed closing speech is your MAP.

It tells you where you are going, what you have to do, where the other side will attack, and where you have to get to.

It tells you everything you will want to do at trial.

And the trick is to be within 80%.

Your actual closing speech should be within 80% of your proposed closing speech – if it is not, then something has gone wrong with how the evidence has emerged at court, meaning you've been slack at witness control – which you will learn more about shortly.

***

So, get this, really get this, really really get it:

1 By preparing your proposed closing speech, you identify the comment you want to make;
2 From the comment you want to make, you identify the facts you want to hear;
3 From the facts you want to hear, you identify the questions you want to ask, and of whom.

It's that way round.

It is not, not, not:

NOT, from what the witnesses say under loose questions, you then wander about identifying what the facts are; and from what the facts are, as they emerged willy-nilly, you then identify what comments you think you should make; and from the comments that seem available because of how the evidence has emerged willy-nilly, you then craft your closing speech.

No ! - IT IS THE OTHER WAY ROUND !!!

***

Chapter 8

Addressing the Judge

A judge is not a jury. A judge usually requires different treatment.

Contrary to some silly rumours, judges are usually wise, excellent lawyers, very experienced trial advocates, and fair.

Assume this to be the case.

In fact, it is usually a good idea to find out about your judge. Ask the usher what mood she is in. Ask in the robing room what she is like. Learning about your tribunal is part of your job. What you discover can be used to the advantage of your case, and can hone your address all the better to fit the judge's expectations.

***

Some advocates start with the belief the judge will be slow, perhaps other worldly, even daft: this is crazy advocacy. It annoys the judge and so you lose precious respect. It makes it more difficult to persuade the judge because now you are likely to be ignored, as it might be thought to be a loss of face for the judge to agree with you.

***

Understand the judge's need for formality. Don't fight it.

Judges occupy a formal position in society. They have enormous power within the law. They can separate families, they can change lives with jail sentences, they can imprison witnesses (and advocates) for contempt, and they can seize huge sums of money and freeze assets. Within society's pecking order, they are by necessity in a higher position in their court to all around them, and rightly so. Quite literally, they sit higher than those around, on the Bench. Their important status is carried and made accessible by formality. There can be no other way. There should be no other way.

So a judge must be approached with:

RESPECT and
DEFERENCE and
POLITENESS.

***

You can disagree, but always with deference.

You can agree, but not casually – instead, always with politeness.

You may not see eye to eye.

But
never,
never,
never,
forget respect.

Ever!

She is in charge. You are not.

For example, don't ever say, as I have sometimes heard said, 'I hear what you say' – it means you get the point, disagree with it, and think little of it - you will be blown out of the water, rightly so.

If the judge senses you do not respect her, you will not be persuasive, which is your job, so you will not be doing your job properly.

***

And furthermore, do not address a judge as ‘you’ – it is always ‘your Honour’, or ‘your Lordship’, or maybe ‘your Worship, possibly even ‘your Grace’- get the right terminology, and do not be over-familiar by saying things like: ‘what *you* said was’… no, it is ‘what *your Honour* said was…’

And if referring to another judge, it is not: what *she* said was – it is ‘what *her Honour* said was…’

This may sound pernickety, but it is quite important, and effective – done right and the Judge will respect that your respect her – done wrong, and the Judge will think you a rank amateur.

***

Submissions should be BRIEF.

The judge will see the point. It does not get better by banging on and on.

Little more need be said on this.

Remember it.

Full stop.

***

To a judge, a point need only be made ONCE.

Be sure however the point has been heard and understood.

EYE CONTACT will tell you if the judge has the point.

So too will the movement of the JUDGE'S PEN - watch the pen, or fingers on keyboard, to see that what is being submitted is being written down, and do not race ahead of the speed of the pen when making your submission.

And don't keep *repeating* the same point as it will not get more persuasive by repetition.

***

Of course, what is permissible is to come at the same point from different angles - although arguably this is in fact making different points.

> *'The car was travelling too quickly,*
> *It certainly was not travelling slowly,*
> *It was speeding far above the speed limit,*
> *Travelling way too fast for the amount of traffic on the road.'*

This all says pretty much the same thing – four times - that the car was too fast - but in different ways. That's ok. But just don't keep repeating, simply, and boringly, and maybe a little pathetically, that the car was speeding – young advocates often do it, coming back to the same stock phrase, as a comfort, or word-hold, while they look for something more to be said, of course with little eye contact, and showing poor preparation.

***

In a submission, your OPENING PARAGRAPH SHOULD BE REHEARSED.

It should capture neatly and succinctly the overall point you wish to make, and why. It should be a *clear summary* of your position.

After your opening paragraph, provide the judge with a *structure* for the detail of your submission. List the areas you will cover. Allow her time to write the areas down. Watch the pen.

Now take her to each area, and begin each area with a clear summary of it.

Then the detail.

***

SUMMARY, THEN DETAIL.

Remember that if the judge can follow your argument easily, this gives you respect and will help make you persuasive.

And what helps the judge to follow the argument is an opening clear summary. It provides a MAP. Judges love maps. With a map, they will understand where you are going and why. You become easier to understand. And if you are easier to understand, you may become dangerously close to being irresistible.

***

DO NOT ASSUME YOUR JUDGE KNOWS ALL THE LAW,

….OR EVEN ANY OF IT.

Remind her of it. Do not be afraid.

Slowly.

Refer to the authorities - *slowly*.

Read the relevant sections of statute - *slowly*.

Make sure your judge is on the same page, at the same paragraph, at the same word.

Pause, and allow the judge to arrive at the same point as you.

***

So many submissions are hurried, perhaps out of fear the judge will think she is being wrongly taught to ‘suck eggs’, or out of simple nervousness.

But remember JUDGES ARE PEOPLE, NOT MACHINES. They cannot know everything in the law.

Sometimes a judge's recollection of a former case is just slightly inaccurate, in a material way which is highly relevant to your case. You won't know this unless you take her through the authorities - and you would not have known it if you have assumed she did not need to be reminded.

***

I’ve said earlier judges can be assumed to be excellent lawyers. Now I’m saying don’t assume they know the law. Some may think I’m contradicting myself. I’m not. A judge cannot be assumed to know the letter of every statute and the precise ratio of every case. So much in a legal argument can turn on the precise words. What you can assume is that judges, as good lawyers, will be very able at absorbing the implications of the precise words. And they will usually thank you for reminding them. They will usually know quite a bit about the area under discussion. But it is best for the advocate to proceed on the assumption the area is new to the judge, and in this way, you will not make the mistake of assuming the judge knows a point of detail which in fact she does not, is then embarrassed you have assumed she does know it, and is now in danger of losing face, and so inclining against your argument to preserve her dignity.

And you will be helped by the judge if the area is really very well known to her – she will tell you – so you need not worry that she might think it unnecessary to remind her of the law – if there really is absolutely no need, you will be told. At the same time, you can rely on your judge to be fair-minded, so she will often quickly point out the areas which are new to her.

***

Just sometimes, oh just occasionally, very seldom indeed - but yes it does happen - your judge might actually…well…be completely wrong on the law, or on some fact, but think she is utterly and completely right.

Oh dear – you have to find a way of correcting her, without causing loss of face, while not rolling over to remain popular with her, and so sell your client down the river, and yet not lose respect by picking a fight, on what the judge thinks is a bad point, but you know is not, yet you risk your credibility to correct her.

So, it is now that you need the cunning of Iago, the pluck of Lady MacBeth, the silver tongue of Henry V, and the chutzpah of Mark Anthony. Do not stand mute like Hamlet – you must step into the fire, and weave your words with care, self-effacement, some flattery, perhaps even just a smidgen of humour, guided always by the thought you wish to assist rather than fight.

Imagine you stand alongside her, showing the way, as a caring guide, rather than stand in front of her, telling her what's what, as an authority.

You are not the authority, she is, so help her to get it right.

***

When addressing a judge, *remember to try to see the overall position from her point of view.*

I have mentioned this before – it is one of the *three beacons* - but it is so important, I could mention it on every second page.

From the point of view of the judge, always, you are there to ASSIST. And a judge will value your assistance. She will want to understand your argument, even if she will disagree with you in the end.

Don't rush, don't hide, stand solidly, reassured by the knowledge that with politeness, deference, a slow delivery, one point at a time, assuming the law to be new to the judge, perhaps with a good, short skeleton, and above all with respect, just about every judge will listen courteously and with approval.

And if listening, you are more likely to persuade her.

***

Chapter 9

Legal Writing

Addressing the judge includes legal writing.

The golden rule is that LESS IS MORE.

Legal writing is where you offer a formal pleading or argument for the Judge.
It is not casual prose for a Sunday newspaper. There are often rules about size and style of font, of spacing between lines and paragraphs, sometimes on how to number paragraphs, and often there a word limits and page limits.

You may ask ‘why limits?’

Well, there are lawyers out there who think they can show off how clever they are by writing caboodles – yep, oodles and caboodles - real tomes - heavy lengthy impenetrable verbiage, cross-referencing lists, footnotes, and obscure case precedents – an impenetrable cross between the writings of Karl Marx and an amended statutory instrument, and with the vibrancy of an instructions manual for a car alarm, all neatly hole-punched and presented cheerily in a file.

It is madly thought by some the more you write, and the more intricately, the more right you must be.

Stop that now!

***

You are there to help the judge, not kill him through mental anguish occasioned by reading the unreadable and irrelevant.

Keep it short, and to the point.

If you really know the point you wish to make, get to the point – fast.

Legal writing should be like a cavalry charge – swift, full, impressive, with no messing round, it should cover the ground, all of it, and do the job, fast. Legal writing is not the military equivalent of the trenches of WW1 – endless, uncertain, and bogged down.

There should be nothing complicated about court. The whole point of you being involved as an advocate is to make things simple. What started out as seemingly complicated to the parties ought to have become clearer through the legal process. You are paid to explain to the judge where the problem is, and why you win. If you cannot explain the problem simply, then you do not understand it. And if you do not understand it, you will give that away by writing over-complicated verbiage.

Which will not be read – it will merely be skimmed – and you will therefore have failed to persuade, which it is your job to do, and every legal writing is an opportunity to do it.

So you have wasted your time writing – and you have weakened your credibility.

So please, if you put anything in writing, make it count – and to do that, KEEP TO THE POINT.

***

And remember, legal writing should focus on the *solution*, not how big the problem is. The judge needs to be helped to shore, not drowned in paper. Some discussion is often necessary, but as little as possible is best – the procedural history, the facts, the narrative of the arguments, keep these to the ‘essentials’. This is one of the hallmarks of an able lawyer – being able to distil large amounts of material to what is needed, and being right about what is irrelevant.

***

Let’s talk about the most widespread legal writing, the SKELETON ARGUMENT.

Judges today often require them, usually in appeals and on points of law.

And let’s be excited about this.

If someone tells you a skeleton is a boring formality, they are wrong – skeletons can be a vital part of advocacy in a modern trial. They can put the judge on your side - or against you - before the case even begins.

They are not a formal pleading. Instead, they are an opportunity to put your case in a good light and your opponent’s in a weak one.

***

Different people say different things about skeletons. There is no right or wrong way to prepare them. What follows therefore is my own view.

A skeleton should be a SHORT document which lays out the HEART of the argument with references to the relevant law.

There is an art to these documents.

Both in how to prepare them and in how to use them.

***

A skeleton should whet the appetite - it should be a teaser.

Its purpose is to get the judge provisionally on your side.

What I suggest is that *it should not be a treatise* on every aspect of the argument.

Ideally, it should not provide the judge with the opportunity to decide the issue on the strength of the skeleton. It should show the area where the argument is, and what you suggest is the answer, without being an exhaustive analysis on which the judge is offered the opportunity to disagree in the quiet of his room without you there, unable to influence his mind as it closes against you.

Think about it: treatises may not be read fully. Moreover, what is there to say at the hearing if it has all been said in the treatise? And pointedly, you have *no control* over the judge while he is reading the skeleton before the hearing. If you have set out in the skeleton to persuade the judge, and the judge has been unpersuaded, you've lost, before you have opened your mouth - and yet it is when you open your mouth you should be at your most persuasive.

***

So don’t set out in a skeleton to persuade. It should whet the appetite.

Hold something back.

That ‘something’ is usually ‘you’ – when you lock eyes with His Honour, and bring your argument to life.

***

The skeleton should provide a short summary of the facts as you would wish the court to find them, and a short summary of the law as you would suggest is how it stands, with clear references to where the law can be found, and briefly how you suggest the facts apply to the law.

No more than that.

Facts as you suggest they are,
Law as you suggest is relevant,
Then how you suggest the facts fit the law.

Brevity, brevity, brevity.

The detail of the argument comes later, when you open your mouth in court.

***

Most important, YOUR SKELETON SHOULD START WITH EXACTLY WHAT YOU WANT AND WHY.

State clearly, with deference, the outcome you seek – this should be the first paragraph.

***

There is a school supporting long skeletons. Some people suggest the skeleton should contain every single aspect of the argument. It is fair to say this can work. It can be particularly effective in a Magistrates Court where there is a lay bench who may be impressed - and even a little intimidated - by a full argument, so that, yes, this can happen, they believe you must be right if you have written so much.

However, on balance, my own view is that a long document risks the court having made its mind up before you get to argue the point. Or worse, it is not fully read, and still, the judge has made up his mind!

And as I was saying earlier, it encourages long legal writing in general, which is unattractive.

So, if you are going to write a long one, make sure you have the ‘right audience’ for it – remembering, most tribunals will thank you for brevity.

In time you will find your own style. I suggest you start short, and get longer if that suits you better.

***

So what do you do with the skeleton at court?

How do you use it on your feet?

Use it as your map.

Don’t read from it.

But do quote from it.

As I said, but it bears repeating, *begin your argument by capturing the bulls-eye point in a neat opening sentence, making clear what you seek and why you should win.*

Then identify what you say are the facts, pointing out where you have mentioned them in the skeleton.

Now develop where you say there is an argument with your opponent on the facts, and why you should win it.

Explain how you suggest the law fits the facts as you suggest they are. Identify where the arguments lie, and explain why your argument beats the other side, reminding the judge of what is in the skeleton.

Take your time – though don’t ponderously dawdle – keep it moving – watch the pen.

***

Refer back to your skeleton time and again, quoting from it, and then delving into detailed argument. Anchor your judge to the skeleton, and then take him on a tour of the legal battlefield, bringing him often back to where you say the best vantage point is for considering the argument, which ought always to be in the skeleton. In this way, if you take him to where you say the best vantage point lies, you have an attractive opportunity to show him the legal battlefield from your point of view.

Think of a skeleton as a pair of binoculars with which Wellington surveyed the battlefield of Waterloo. Lend the judge your binoculars. Of themselves, they will not win the battle, but they can help.

Come to think of it, Wellington had a telescope – binoculars had not yet been invented in 1815. But you get the point.

***

Chapter 10

Document Management

There are is only one thing to keep in mind concerning document management:

TIDINESS.

And tidiness arises in two forms: *paper* and *digital*.

A good advocate has her paperwork in order – at all times.

And this takes time. And effort. And you have to keep on it.

It is very easy to let things go. And go they will.

***

Let’s talk first about PAPER.

When you start out, the paperwork is usually little. And this can lead to bad habits forming early on. Papers get lumped together, and kept in a mess – but you think it does not matter much, as there are perhaps only 20 pieces of paper in the brief.

But this will change. In little time, as your cases become more sophisticated, the number of pages will grow to 50, to 100, to 500, to more.

At the independent Bar, often there is no one overseeing your practice, which means no one calls you out for slovenly paper management.

Yet work is often returned, as you may be unavailable to deal with a matter, so someone else does it. And it is irksome to pick up another’s slovenly paper-mess.

But more importantly, TIDY PAPERS MEAN A FOCUSED MIND.

If your papers are a mess, then usually so is your case, and so are you.

So start early, and get used to good paper management.

***

At the Bar of England and Wales, papers often arrive loose, tied in red or white ribbon.

I suggest every brief should go in a *ringbinder*.

Buy one.

This may mean punching the paperwork – so just do it.

Start with your first page as the backsheet which identifies the parties and court.

Then the indictment or pleadings.

Then the instructions.

Then the proof from the client.

Then the witness statements.

Then the unused materials.

Then the correspondence.

Then the advices you have written.

***

You should know where every piece of paper is – every one, no kidding - and how to find it within 10 seconds – that is not a bad rule of thumb –10 SECONDS.

And the act of assembling the brief in this way leads to 3 things:

1 you will naturally see how the case fits together,

2 you will know where to place further materials as they arrive,

3 you will feel on top of the case.

Never fails.

This is easy stuff – but there are many who do not do it – and I like to think they are easier to beat in court, because their messiness usually means messy advocacy.

Once in the habit, you will find that assembling the paperwork becomes your act of ‘owning the case’, and it becomes a professional pleasure.

***

As for DIGITAL material, there is more and more of this.

You have really got to develop a system for keeping on top of it.

It comes in as ‘attachments’, which have to be opened, and somehow on a computer, for me *I find I read it less thoroughly* – as I think I can always return to it later, as it is on my computer which goes everywhere with me, and it is less readily easily marked up and highlighted.

Also, though maybe it is just my age, it does not feel so intimate on a screen as paper between my fingers.

Emails are correspondence, yet it is easy to fail as a matter of discipline to gather them into the brief.

The attachments and the emails become separated in cyberspace. And the attachments simply lie about in a folder, separate and unintegrated. So the brief lacks cohesion.

So here is my suggestion, which in our computer age I hope is not luddite – if you are a courtroom advocate, *print everything out*!

Printing should be part of your daily routine.

No matter how big the attachment.

Get used to it.

TURN DIGITAL MATERIAL INTO PAPER.

And go get a ring binder.

***

Chapter 11

The Opening Speech

This chapter is written with crime in mind, and I am conscious it may not translate effectively to civil practice. It presupposes your audience is a jury. Some ideas will translate and the reader is invited to pick and choose.

In crime, the opening speech will usually apply to prosecutors.

***

It is rare to make a defence opening speech, which is more of an art and very risky. Unless you have a lot of experience, *don't do it*. The primary problem is creating hostages to fortune, where you say to the jury they will hear certain evidence – and then they don’t. By this stage in a trial, the jury really wants to know what the defence will be saying. If the defence witnesses do not say what you say they will say because they go off script, the jury can think it really significant and hugely hold it against your case.

So unless you know how to control witnesses - which you probably don't yet if you are reading this book - and unless you have developed that nose which tells you whether the witnesses really will tell you what they say in their prepared statements - which you probably have not yet as it will take you about seven years of experience to develop that nose – well, just don't do it.

***

A prosecution opening speech before a jury should review
the facts,
the law,
and the burden and standard of proof.

The precise order is ultimately a matter for you. There are no firm rules.

Many find it makes sense to start with a *short, simple opening paragraph*, which completely, neatly, and succinctly in a nutshell, tells the court what the case is about. We can call this the FACTS -SUMMARY.

Then it helps to explain the BURDEN AND STANDARD OF PROOF.

For example:

This is a case of burglary, of a home, at night, where jewellery was taken, but luckily, the householder awoke, and with good eyesight got an excellent prolonged view of the burglar in street lighting. This defendant was later identified as the burglar on an identity parade, and then in interview made no comment. It will be your task to decide whether the Prosecution has proved, after hearing the evidence, that you are sure he was the burglar that night.

Now explain the DETAILS of the facts as it is anticipated they will unfold – the address, the time, the names of the witnesses, the type of jewellery, introduce the plan of the area, where the street light was, how far was the witness, the story of the chase, the later arrest, the details of the interview, and so on.

Finally, explain THE LAW.

***

Neat facts-summary,

Burden and standard of proof,

Details of the anticipated facts,

The Law.

***

Be careful explaining the law.

GET IT RIGHT.

Law can be boring and can be clumsily done. It can confuse rather than illuminate.

Draw the jury’s attention to the indictment, and go through the particulars of the offence. Explain how the anticipated facts fit the law.

Deal with the indictment BRIEFLY and leave the details of the full jury direction to the judge.

***

Make sure you watch a number of openings, and discover the tempo of the delivery and the extent to which the law is explained. It is not too much. It is not too little. It is just enough to explain what crucial facts the jury needs to seek in the evidence. It is just enough to highlight to which areas the most attention must be paid when the witnesses later address the court.

Usually, most criminal allegations are easily understood, even if the detail of the law is unknown to the jury. Crime tends to centre round clear ideas of dishonesty, violence, and lust – it’s the stuff your mum taught you on her knee not to do.

But *always write out what you propose to say on the* law – just because most crime seems common sense, don't wing it, as you are guaranteed to stumble over words, helplessly recalling as you blunder along that there is a complexity of legal directions in previous authorities, and you will go beet-red as you sprout perspiration while feeling His Honour's eyes swivel disapprovingly onto you.

***

Indeed, it is recommended you WRITE OUT THE WHOLE OPENING, particularly facts-summary and then the details of the facts.

No kidding.

Always.

Even for simple cases of shoplifting.

I still do.

***

By writing out everything - the facts-summary, the details, and the law - you will deliver a faultless performance.

In your first act before the court, you will therefore appear commanding.

You will have respect. You have demonstrated your competence early.

You will therefore already appear persuasive.

In addition, the jury will clearly understand you. As everything will have been carefully weighed beforehand, there will be no stumbling over the opening, giving rise to confusion and puzzled frowns. The jury now fully understands, and knows what to look for in the evidence.

And note this: by writing everything out for the opening – as with the early preparation of your closing speech - you will immediately have identified what evidence is missing and what evidence is weak. So from your carefully crafted opening words, you have the opportunity to minimise the importance of the weak, and emphasise the importance of the strong.

***

But remember this:

WRITING IT OUT DOES NOT MEAN READING IT OUT.

Reading is dull, and if you are dull, you will not be persuasive. Nor will anyone listen to you, so the point of your opening will be lost. You will probably remember much of what you have written anyway. Make sure you look up at the jury and don’t look down all the time at the piece of paper upon which you have written your opening.

Don’t be boring.

***

The importance of a good opening is another one of those things which cannot be overstated. Just think how hard it is for a jury to absorb what a case is about. Advocates have had time to prepare, and have had papers to study. They have learned about the case through reading and the use of their eyes, which is how we mostly absorb information. But juries learn with their ears. Think about how hard this is. Listening is difficult. Attention span is short.

And please consider how the environment is unfamiliar - wigs, gowns, docks, ushers – and of course, imposing figures on the bench in colourful robes. It is easy for a juror to feel uncomfortable and distracted. Your job is to make every juror feel comfortable. And you can do this with a good opening.

A good opening gives the jury a MAP - there's that word again – sorry, but what a good word! – it tells them what the case will be about, it stops them feeling distracted, and it helps them to look for the significant evidence when a witness speaks.

The map is vital, and they will thank you for it, by giving you their ear whenever you speak.

***

The question often arises just how far should we go in an opening to persuade the jury we should win.

In other words, should we colourlessly explain the facts as they appear in the witness statements, or should we attempt to create an atmosphere and put some colour before the court.

Unless you are very experienced,
COLOURLESS IS BETTER THAN COLOURFUL.

However, as an aside, closing speeches should be colourful. They are different. They are the moment of persuasion. They contain comment. We've talked a bit about them already and we'll talk more about them later. But an opening should usually be comment-free, simply reciting the facts as it is anticipated they will unfold.

So, keep the following in mind as not a bad rule of thumb:

Colourless opening,
Colourful closing.

***

However, let's talk about colourful openings for a moment.

A colourful opening is often said to be '*opening high*'.

Opening high is where you attempt to poison the mind of the jury against the defendant straight away.

That is what you do - poison their minds. Strong words. And of course, it can be met with a strong reaction. If done properly, the prosecution are way ahead of the defence. If done badly, the advocate is disliked by the jury.

Particularly if done transparently so that the jury feel they are being manipulated.

If done badly, the advocate loses just about all credibility. And without credibility, you cannot be persuasive. So opening high is a risky business.

***

Phrases must be carefully chosen for maximum impact, but *subtly*.

A small amount of indignation, affront, even outrage is gently injected into the advocate's poise, tone, and gestures. This requires considerable skill, and can easily be overdone. It actually takes years to learn how to do it well.

In the US, just about everyone opens high all the time. It is expected there. In England, it is not. Don't be inspired by the splendid tv series *LA Law* - am I showing my age? – it was in the 1980s, brilliant stuff, I watched it every week - it's great tv, it really is – rent the dvds - but it makes for lousy courtroom practice in London – actually, in most places.

A better series is perhaps *Kavanagh QC* – there is good understatement there – a wonderful series in the 1990s – again, rent the dvds, or get it on itunes- I have them all.

Better still, look to the Central Criminal Court at the Old Bailey. This is the greatest place in Britain, perhaps in the world, for *quality* high openings. Some of the ablest prosecutors anywhere on the planet can be found here.

Visit the Bailey. Sit in the public gallery. Watch them at work. Learn from them. It’s the best afternoon an aspiring young advocate, criminal or civil, can spend. Really. It’s free and it’s fantastic.

***

A key danger in opening high is saying that particular evidence will definitely be given.

Civilian witnesses are generally not reliable. Whatever they may have said in their statements, they do not necessarily say it in evidence. They get confused. They forget things. And sometimes, events have been overstated in the statement, so that in evidence at court, they are milder, and with a judge about, more cautious.

It is dangerous to open high on what civilians are expected to say.

***

Police officers however can be word perfect, as they are allowed to follow their notebooks, and will therefore usually say exactly what is in their statements.

Doctors are usually the same, as they will have contemporaneous notes to follow.

In fact, word-perfect evidence can usually apply to most professionals and experts, as they will be able to refer to their notebooks, workings, and reports, and provide their evidence precisely as you read it in the papers.

You get the point - if you open high on evidence which does not materialise, you look foolish, lose respect, and it is easier now to lose the case.

So the key is to KNOW FOR SURE WHAT WILL BE SAID.

***

Reasons for opening high are probably restricted to either serious cases with expert and police evidence of crucial importance where you know exactly what will be said, and occasionally to serious cases, perhaps like fraud, which will probably be a bit dull without the injection of a little drama at the beginning.

In the dull cases scenario you balance the risk the evidence will not reach the height of the opening against the risk that without a little colour the jury will switch off, not follow the case, and acquit.

So**,** a general approach might be this:

OPEN HIGH
WITH EXPERTS,
DULL CASES,
OR SERIOUS CASES.

If you open high on a non-serious case, like shoplifting, you may come across as a Victorian prude.

***

In all other cases - which will be mostly your work in your early years, including shoplifting - and unless you are very experienced, OPENING LOW is best.

Just recount the facts as they appear likely to be - no frills, no excitement - and let the witnesses carry the drama.

It is safe, because you have lost no credibility if the witness fails to come up to proof. And you can bend your closing speech - which will usually be of a very different colour to your opening - to the actual evidence given.

A low opening is dispassionate, clear, and a bit colourless.

It is a summary of the facts, as the prosecution anticipates them – with a little law.

IT IS NOT A SUMMARY OF THE ARGUMENTS – that’s for closing.

Remember, where there are civilian witnesses, it is better to give the gist of their statements rather than the exact words within them, or they may surprise you and the court by saying differently.

***

An opening should be delivered SLOWLY WITH PLENTY OF PAUSES.

The jury is just settling into the case. It wants to understand clearly what the case is about. Like I said, remember how distracted a new jury will be, with the wigs and gowns, the court layout, the appearance of the defendant, and allowances must be made for their distraction.

Settle the jury in gently and firmly.

Be sure they understand what you say.

Don't rush in the excitement of starting.

Show command.

Keep it simple.

***

At the end of the opening, you want the jury to think three things:

> *We think you are credible, likeable even, sensible - you personally, not just your case,*
>
> and
>
> *We understand what the case is about, and how the evidence is supposed to fit together,*
>
> and most importantly
>
> *We understand what evidence to look for from the witnesses.*

Now you have the jury thinking with you.

They see you as their guide.

They will follow you.

You are now ahead of the opposition.

***

Chapter 12

Witnesses

Advocates have a remarkable privilege.

They are allowed to ask highly personal questions of people in a public arena.

And people must answer them.

Few others have this privilege, apart from judges, and sometimes politicians.

There is a danger advocates can march into people's lives, turn them completely upside down, and waltz out for a glass of wine.

The public sometimes perceives this is what advocates do.

For the advocate, it is just another day's work. But for the witness, who often has not been questioned in court before, nor ever will be again, the experience may have been devastating, and never to be forgotten.

***

Do not become blasé - REMEMBER THE IMPACT you will have on others' lives.

***

WITNESSES ARE PEOPLE.

They are not objects.

Try to show that you care for their story - often even when cross-examining. Show that you empathise, human to human – to your own witnesses, and also to the witnesses most dangerous to your case. If they are wrong, then fine, but treat them like human beings, and not like dirt.

They are not for picking over dispassionately, or disdainfully, like some laboratory specimen.

There are some truly awful advocates who treat witnesses appallingly.

Never,
ever,
be like that,
EVER.

If you have to do down a witness, try to be kind, not harsh – harshness should always be rare. Remember, people often lie to protect their dignity, or their loved ones, or to save face – these are human responses – your job is often to tease out the truth, not to rub people's noses in muck, and you will be respected by the tribunal for being kindly, more so than if righteous, even when right.

***

ALWAYS BE POLITE.

ALWAYS.

Even to the witness who is the greatest enemy of your case.

Especially to that person.

Anger,
disdain,
and answering back,
are
always,
always
dangerous.

***

Disdain makes you look arrogant and so you lose respect.

Anger makes you look as if you are losing.

Answering back makes it seem you are too involved in your case.

Try to envisage you are above the fray, while keeping a measure of common sense.

Some advocates can play the disdainful card well. And it is rarely early in an examination. But these advocates are very experienced. If you play disdain badly, you will usually lose the case.

So in the early years, don't do it.

***

Witnesses are usually intimidated by the court and the formality of wigs, gowns and striking robes.

If they are your witnesses, PUT THEM AT EASE.

Settle them slowly.

Ask easy questions to begin.

***

Be wary of asking civilians to state their home address in open court - this often unnecessary request can completely unsettle them. Is a public declaration of a home address necessary? Can it be written down? Think about this.

Ensure questions are simply phrased.

One question at a time.

Look at the witness.

Eye contact again.

Smile, even – it works wonders.

Invite them to keep their voice up, to project their voice across the room, reminding them that the microphone usually only records their voice and does not amplify it.

Invite them to face the tribunal, not the advocate, and to address the tribunal directly, especially on really important points.

***

Develop a SYSTEM with your witness.

Question. Answer. Question. Answer.

Encourage the feel of dialogue.

Get a rhythm going.

But pace the speed of the dialogue to meet the judge's pen.

Keep things slow and even and pleasant, and the witness will feel more comfortable.

Remember that every witness has a personality. Try to tease that personality out, or they may in their discomfort appear wooden and lifeless and will perhaps wrongly be less likely to be relied upon by the tribunal.

***

And finally, for all the brooding atmosphere of a court, for all the formality and strangeness of it, your witnesses have a story to tell.

They may feel in front of lawyers it is a story which must be told in some formal manner with big words.

Stop them.

Get them to TELL THEIR STORY,
easily,
in their own words,
without worrying about impressing all the supposedly clever lawyers.

***

Chapter 13

Questions

Questions should be SHORT.

Each question should seek one fact at a time.

Only one.

Each question should be one question, not multiples of questions rolled into one long sentence.

***

One question seeking one fact.

‘What is the make of your car?’
‘What colour is it?’
‘Is there any damage to its front?’

Not,

‘Tell us about your car, for example its make, its colour, whether it has any damage to its front?’

***

One question seeking one fact.

In examination in chief.

And cross-examination.

Both.

Always.

The big problem is that multiple questions create a list in the mind of the witness, who is probably ill at ease anyway, can’t then remember the list and will answer only one or two aspects of what has been asked, and possibly wander off script.

If you ask long multiple questions, you will look clumsy, you will confuse the witness, and you will undermine the credibility of both of you.

***

KNOW THE QUESTION BEFORE YOU ASK IT.

Don't set off in the expectation you will know what you want to say, as yours may be a long and clumsy voyage.

And not knowing exactly what you want to ask will usually lead to the *urrrm ehhh* distraction.

The *urrrm ehhh* distraction is where questions are proceeded with *'Urrrm Ehhh'*. Ask your colleagues whether you do this, as you are almost certain not to be aware of it.

Video yourself and check there.

If you are a member of the Urmm Ehhh brigade, here's a hopefully helpful hint: - make yourself conscious of *exhaling slightly and quietly* before each question. This will definitely kill it off.

Another hint is to concentrate before each question on *wriggling your toes*. I've mentioned this before, as it stops fiddling. It cannot be seen. And the effort involved in wriggling them occupies your mind so much that you forget to do the Urmm Ehhh thing.

***

Urmm Ehhh is a fill-in. It is noise designed to fill in the space between answer and next question, as you are trying to work out the next question. Usually we feel uncomfortable in silence, when everyone is waiting for what we will say, so we feel the need to fill that silence with noise.

DON'T BE EMBARRASSED BY SILENCE.

Relish it. Use it to create tension. Use it to create command. Don't hide from it. All eyes are focused on you for your next question. So let them focus on you – stand like a rock and relish your control.

***

The other fill-in distractions are :

‘Right’

OK’

‘And’

‘So’.

Don't do this. Please!

Advocates sometimes say *Right* or *OK* in response to each answer. Again, you are unlikely to be conscious of it, so ask your colleagues. Or check the video.

The problem with Right and OK, aside from being irritating like Urmm Ehhh, is that it also suggests you are approving of the witness, and that you are signalling the correct answers to the witness. This has the effect of undermining the witness's credibility, and of course yours, because it may look as if you are telling the witness what should be said.

As for *And*, it connects you to your next question, and is just plain irritating, so that the listener starts listening out for its repetition, almost making a game of it, just listening for the next ‘and’, and is not listening to the question and answer.

***

As for *So*, this is like ‘and’, as in the mind of the advocate, it connects to the next question, but unlike ‘and’, it tends to suggest to a witness that there is ought to be *conclusion* coming, as ‘so’ is like ‘therefore’, and of course there isn’t a conclusion invited, it is just a fill-in, and it therefore often causes confusion to the witness.

***

Yet another fill-in is the repeated answer.

Advocates sometimes idly repeat the answer just given to fill in thinking space before the next question.

It is the most irritating thing you can do.

And it completely undermines your credibility as it makes you look as if you are over-emphasising the evidence.

With any luck, the judge will stop you.

***

However, do not confuse the *idle* repetition of the answer with DELIBERATE REPETITION.

A deliberate repetition is where you repeat an answer which has been really devastating against the opposition.

Repeat it slowly.

Let it hang in the air.

Look to the tribunal for good measure.

And only do it once or twice with a witness or you'll be written off as a drama freak.

***

So, to nail this down, I'll say it again:

Fill-ins are:

Urrrm ehhh
Right
Ok
And
So
The idly repeated answer

And what happens with fill-ins is that the tribunal begins to listen out for them, and stops listening to the substance of the evidence, smiling inwardly at every time you do it again, thinking you are a buffoon.

You can't be persuasive if they think you are a buffoon.

Fill-ins are difficult to control. But you must make yourself aware of them.

Like I say, try the short exhale. Or the toes.

Whatever. Just don't do it

***

Chapter 14

Examination in Chief

Some say this is the most difficult skill.

In some jurisdictions it is called *direct* examination.

It is more difficult than cross-examination.

Why?

Because without leading the witness, we must extract the relevant evidence.

WITHOUT LEADING.

***

With police officers and experts, this can be easy since they can refer to their notes.

Civilian witnesses on the other hand rely on MEMORY.

Incidents can appear different to them months later, and often they will wander off the point and must be brought back to what is relevant.

A witness at ease, to whom you have smiled, and gently settled with clear opening questions, is more likely to say what you require.

Always remember, the mind of an uneasy witness is generally blank.

***

On matters in dispute, you cannot lead.

ON MATTERS IN DISPUTE.

There is nothing wrong with leading where matters are not in dispute.

ASK YOUR OPPONENT WHAT CAN BE LED.

Sometimes the answer is nothing.

But usually, things like the date, location, time of an incident, and the name and occupation of the witness can be led. By leading on these matters you can break the witness into the witness box gently, and settle them.

***

A leading question is one which suggests the answer.

It's a pretty simple concept.

However, the dividing line between leading and non-leading can be blurred.

Sometimes it can be as subtle as voice intonation.

Experience will ultimately tell you the difference.

The problem with leading is not simply that it can be objected to by the opposition. It is the reason it can be objected to you must understand.

If you lead, the tribunal knows you have suggested the answer, and so the value of the evidence is diminished.

Leading will undermine your own case.

***

As a rule of thumb, a non-leading question will begin:

WHO,
WHAT,
WHY,
WHEN,
WHERE,
HOW,
PLEASE DESCRIBE?

Questions which begin in this way are so non-leading, they can be called OPEN QUESTIONS.

***

But there are other types of non-leading question.

CLOSED QUESTIONS are questions which limit the witness's choice of answer. Remember, there must still be a choice, and that's the key to why they are non-leading. The choice has to be genuine.

Of course, while closed questions are non-leading, they can get dangerously close to leading.

There are two types of closed questions:

the word-choice,

-and-

the yes-no.

***

The word-choice closed question gives the witness a choice of words: *was the man tall, or short, or average height?* The word-choice offers a series of words to the witness which need to cover the whole range, and the court awaits which the witness will pick, namely tall or short or average.

The yes-no closed question invites the witness to answer yes or no: *was the man tall?* The choice is yes or no. This is very close to leading, but may not be, depending on how the evidence has developed. The danger here is that it may be thought you are suggesting the witness is tall.

***

So, be careful of asking closed questions without first having laid FOUNDATION through open questions for the basis of your closed question:

Who were you with? - A man.
Please describe the man - He was quite big.
When you say quite big, was the man tall or short or average height? - He was taller than average.
Was the man tall? Yes.

In the course of these questions, which are a mixture of different types of non-leading questions, foundation is laid from the earlier questions and the answers given, for the closed word-choice question and then the final closed yes-no question.

If you had asked the last question as the second question, you ought to be able to see you have gone too quickly to the closed word-choice, so that your opponent may sensibly object that you appear to be encouraging the witness, and therefore leading her, without foundation, to say the man was tall.

***

With closed questions, BE VERY CAREFUL OF VOICE INTONATION. You may be accused of suggesting the correct choice of answer from how you ask the question.

For example, you can’t quietly mutter the first two words in the choice, and then resoundingly declare the third with a cheery grin, as it would be clear that, again, you would be encouraging, and therefore leading, the witness to say ‘tall’.

***

With closed questions, BE VERY CAREFUL TO PROVIDE A GENUINE CHOICE.

I've mentioned it earlier, but it bears repeating.

If the answer you want is obvious among several choices, you will be criticised:
‘Was it so dark you could not have seen anything, or maybe just a bit, or were you able to see well enough to have a clear view of the burglar's face?’

In theory, there is a choice, but assuming you are prosecuting, it is pretty obvious what you want the witness to say. The choice is not genuine. The question is leading.

***

On the other hand, the questions might be:

What was the lighting like? (Open)
- There was street lighting.
Was it light or dark or dusk? (Closed word-choice)
- It was dusk.
What distance could you see? (Open)
- 10 metres.
What could you see over that distance? (Open)
- I could see the burglar.
What of him could you see? (Open)
- I could see his upper body.
Could you see his head? (Closed yes-no)
- Yes.
What could you see of his head (Open)
- I could see his face.
Did you say you could see his face? (Closed yes-no - repetition for emphasis)
- Yes.

If in doubt about whether a question might lead the witness, ask yourself what you would think if you were for the opposition.

***

Avoid the standard phrase: WHAT HAPPENED NEXT?

Sometimes the witness gives a marvellous answer.

Mostly however, the question offers no control, no parameters, and the witness either gives too much detail, too little, or just plain wanders off the point.

***

To avoid losing control of the witness with *'what happened next?'* use instead THE PIGGYBACK.

The piggyback is a way of fixing the evidence in time or space, *by using part of the last answer in the next question* – note the italics in what follows:

> Where were you?
> - I was on the sofa.
> In which room were you *on the sofa*?
> - In the living room.
> *In the living room*, what other furniture is there?
> - A table, a tv, another chair.
> Could you see the *tv while on the sofa*?
> - Yes.
> What of the *tv* could you see *while on the sofa*?
> - All of it.
> *While on the sofa*, did you look at the *tv*?
> - Yes.
> Did you notice anything about the *tv*?
> - Yes
> What did you notice about the *tv*?

So far, no question suggests the answer.
For the answer to the question, please turn over.

***

‘I saw a gun lying on top of it.’

Ok, it's a bit mindlessly dramatic, but I'm trying to get you to remember piggybacking.

So remember it.

***

Take things CHRONOLOGICALLY.

It is easy to settle the witness if you start at the beginning, proceed to the middle, and go through to the end.

Surprisingly, there are many advocates who leap about the chronology. Also, witnesses often jump about backwards and forwards in time. Be aware of it, and stop it, lest the case becomes confusing.

***

However, if a witness misses some piece of evidence, let it go for the time being. Come back to it later.

Of course, this breaches the chronology rule.

But you will only rattle the witness if you keep asking what else was there?

And a rattled witness's mind goes even blanker.

In addition, you risk drawing the attention of the tribunal to your concern about missing evidence. The danger here is even if you do finally get the evidence, its value may be undermined if the tribunal feels your pleading and anxious repeated enquiry has prompted the witness.

But the really tricky thing is to remember to come back to it. It can be easy to forget.

And remember to use a different question to the one which led to the problem in the first place, as it will sound as if you are seeking something new – if you use the old question, the witness will usually remember it, if subconsciously, and give the same blank answer as before.

***

Of paramount importance with any examination in chief is KNOW YOUR OBJECTIVES with each witness.

Your objectives will have been established while *writing the closing speech* on receipt of the brief.

Know what each witness needs to say for your case to succeed.

If you know precisely what you want, it is so much easier to get it.

And what you want is no more than is necessary for the closing speech.

Remember, examining a witness is not a general enquiry.

It is focused on what is needed for the closing speech.

And it is as short as it can be, while keeping the witness at ease.

***

Chapter 15

Cross-examination

The general rule here is **DON'T DO IT.**

I’ve put this in bold – for a reason.

***

People at law school dream of the day they will cross-examine. Their role model is rarely a real advocate whom they have watched in court. Usually it is a tv character, from *LA Law*, from *Perry Mason*, from *Petrocelli*, (I'm showing my age again…), maybe *A Few Good Men*, or even *Suits* which is more recent, great fun, but daft – these are role models from a host of bad films with bad plots, sometimes good shows with good plots, and these examples are all COMPLETELY USELESS.

On tv, witnesses blub.

They are exposed as liars, cheats, villains.

They admit guilt.

They eventually agree tearfully with the cross-examining lawyer, the judge bangs his gavel, and there are gasps from the public gallery. The advocate swaggers to his seat while the witness seems metaphorically a dead duck.

IT DOES NOT HAPPEN LIKE THAT IN REAL LIFE.

***

A witness under cross-examination does not want to agree with you.

He will fight tooth and nail to confound you.

He will misunderstand your questions.

He will provide evasive answers.

He will try to use your questions as an excuse to repeat the deadly features in his testimony which destroy your case.

But blub? Never.

'It's a fair cop guv', you've got me bang to rights?' Never.

Unlike tv, a witness has no script which must be followed. He will try everything to wriggle out from under your questions.

Every question in cross-examination is an INVITATION TO DISASTER.

It is an opportunity for the witness to hammer you and your case.

***

So your first thought should be *don't do it.*

ASK YOURSELF IF YOU REALLY NEED TO CROSS-EXAMINE.

Some of us think we must ask everyone questions or we are not impressing the client.

Nonsense.

Obviously.

But it happens.

A lot.

Always start from the point of view: *if I can avoid it, I will*.

***

If you have to cross-examine, there are ten rules.

Ten.

For the first five years of practice, don't break them.

Ever.

Errr… you will, of course.

But you shouldn't.

You won't be able to help yourself. None of us can. But there are ten rules, and you should know them, backwards, and know when you are breaking them, every time.

If you are going to break a rule, you need to be asking yourself *'uh oh, I'm about to break a rule, should I, what is the advantage, will it go wrong?'*

***

The point is YOU HAVE TO BE AWARE WHEN YOU ARE BREAKING THE RULES.

In this way, you may not do as much damage as you would otherwise do if you did not know the rules and had no idea when, inevitably as we all do, you break them.

So, learn the rules.

Be able to say them in your sleep.

***

The first rule is THINK COMMANDO.

Don't lay siege.

Don't settle into each witness with books of questions.

Like a commando, *you go in, you get what you want, you get out*.

Remember, it's dangerous out there.

Every question invites disaster.

So,
stealth,
cunning,
brevity,
should be your beacons.

It's a raid, not a siege.

***

The second rule follows from the first:

WHEN YOU HAVE GOT WHAT YOU WANT
FOR YOUR CLOSING SPEECH,
STOP,
STOP,
STOP.

STOP.

D'you hear?

STOP.

Don't try and improve on answers.

Witnesses will sense you think you have them, and will back-track.

Weigh each answer against the closing speech you want to be able to make.

If the answer fits - STOP !

***

And try not to say *'thank you'*, as it tips the witness off you have what you want, and they may start trying to undo what they have just said.

Just stop. Full stop.

***

The third rule is hard:

NEVER ASK A QUESTION TO WHICH YOU DO NOT ALREADY KNOW THE ANSWER.

Cross-examination should not be used to dig around.

You have no idea what you will find.

It may be helpful.

But watch out - it may not be. At all.

And you are gambling your case.

Sometimes you have to gamble, but rarely please, and you must have the brain of a mathematical weasel, cunningly calculating the odds of a helpful answer from your experience of people and from your assessment of the personality of the witness.

And you won’t have the courtroom dexterity of a weasel for several years.

***

What then is the point of only asking questions to which the answer is known?

The point is to DRAW ATTENTION to your case.

***

The jury will not yet have seen the witness from your perspective. So make them.

The witness says the burglar was Tommy Smith who he knows locally. Let us suppose the following facts have all appeared either in the witness statement or the evidence in chief (so you do not breach the third rule), but these uncontroversial facts are peppered about all over the place in the direct examination.

Your job is now to draw the facts together to present a fresh perspective.

***

Your perspective.

It was 3am? Yes
It was night-time? Yes
The burglar was in the garden? Yes
You were in the home? Yes
You switched on the lights? Yes
You saw the burglar? Oh Yes
In the back garden? Yes
40ft away? Yes
At the front of the house there is street lighting? Yes
He ran down the back garden? Yes
Away from the house? Yes
He climbed over the fence? Yes
The garden is 50ft long? Yes
He took 10 seconds to reach the fence? Yes-ish
He took 5 seconds to clear the fence? Yep
He was in a hurry? Yes
You couldn't quite believe what you were seeing? Yes
You had just woken up? Yes
You were puzzled by a noise you'd heard? A bit
You turned on the light? Yes
You looked out the window? Yes
You say he looked up at you? Yes
And then he was off? Yep

***

Let’s say the issue is identification; and it should now be obvious what will be said in the closing speech.

If it isn't, you'll get some idea a few pages on.

Note how the questions, which are really a series of statements, have bent the perception of the case.

Cross-examination is all about BENDING PERCEPTION.

It's about getting the tribunal to begin to see the case from your point of view.

It is not about getting the witness to blub.

***

The fourth rule is demonstrated in the questions you have just read above:

ALWAYS ASK LEADING QUESTIONS.

Always.

Never ask an open question.

Tell the witness what the answer is you expect.

You should know what the answer ought to be since it will have been in the witness statement or evidence in chief or is abundant common sense, and so the witness ought to agree with your leading question.

***

A leading question controls the answer.

This is because:

A LEADING QUESTION GIVES THE ANSWER,
AND THE WITNESS SHOULD SIMPLY SAY ‘YES’.

That’s the ideal answer to every question – ‘yes’.

If you give the answer, you control the answer.

Controlling the answer means controlling the witness.

Cross-examined witnesses, out of control, are deadly.

Deadly.

You say what the answer is, and ask as a tag
‘*isn't that so’*, or
‘*that's right, isn't it’*,
turning a statement into a question.

Sometimes you don't even have to say the *‘isn't that so?’* bit, as it is plainly understood that you are asking a question.

***

You don't ask -

‘Did the cat sit on the mat?’
-nor-
‘Where was the cat?’

You ask instead -

‘The cat sat on the mat, that's right isn't it?’

And because you know the answer from what is in the witness statement or from the evidence in chief, the witness will probably say ‘yes’, no more than that, and is safely under control.

***

The very best way to lose control, so that the witness becomes deadly, is to ask for *explanations*.

***

The fifth rule then is

NEVER
EVER,
EVER,
ASK THE WITNESS TO EXPLAIN.

EVER !

This is also known as never ask the witness *‘why?’*

The problem with an explanation from the witness is it will destroy an explanation from you. Your explanation is what you give in the closing speech. Asking a witness to explain will undermine the explanations you will want to give in that closing speech.

Witnesses will almost
always,
always,
find ways of explaining, despite the most cunning plans of the cleverest minds.

***

It is not like in the films where they shrug their shoulders and admit they can't explain.

You may think there cannot possibly be an explanation, and so you perorate with the witness, delivering what you think is the killer blow. The witness is now fighting for his life. So, watch out - he’ll come up with something.

And when he does explain, he will use it as an opportunity to take centre stage in court again, and persuade the jury of his testimony.

Persuasion is your job - do not let it be taken from you and taken over by the opposition.

***

The sixth rule flows inexorably from the fifth, and is so important that it is monumental, huge, just plain massive:

RESERVE YOUR COMMENT FOR THE JURY,
NEVER
EVER,
EVER,
EVER,
FOR THE WITNESS.

Sometimes this is known as do not ask *'conclusionary questions'* – these are questions which demand a conclusion from the witness.

In a roundabout way, we are avoiding asking for an explanation, which is the fifth rule. If you put a conclusion to a witness - if you put what will be your comment to the jury - what you are in fact doing is asking the witness to explain whether your comment or conclusion is correct.

***

Let's look again at our burglar.

From the evidence a few pages earlier, we will want to make the following comment to the jury:

‘It was dark, he was 40ft away, he looked up, there was street lighting on the other side of the house, but no evidence of lighting in the garden, he shot off, he was in view 15 seconds, but the witness must always have been looking at his back as he ran away, if the face was visible at all it cannot have been more than a fleeting glance of someone speeding into darkness, he had just been roused, had been fast asleep, was puzzled, couldn't believe his eyes, looking out a window which because it was night time with a light on in the room as a matter of common sense will have largely reflected the witness and the bedroom obscuring his view out. So in all, we have what must have been a glimpse in darkness with no lighting over a distance of 40ft from a disconcerted sleepy homeowner which is not enough to make an independent tribunal sure of the identification.’

Great comment.

***

But how often do advocates call for a conclusion from the witness.

Here's the stupid question – and believe me, it happens all the time: '*In all these circumstances I have asked you about, you did not see him long enough or clearly enough to make an identification about which you can be sure, can you?'*

And the reply?

***

‘Of course I did. I have 20-20 vision, and he looked up at me, for longer than a glance. You had not asked before for how long he looked at me - it must have been 10 seconds. I could see he was thinking what he should do. The bedroom light lit him up clearly. And I was wide-awake, having been frightened, not just puzzled by the noise. Oh, it was Tommy Smith all right. He knew I'd recognised him. I could see it in his face. That's why I guess he paused for so long before running off. Our eyes met. It was him.’

Oh dear. You have spectacularly lost control.

What was looking attractive has been undone by being over-eager to get the witness, *LA Law* style, to crack up.

So just don't do it.

Never ask why.

Never ask for an explanation.

Reserve your comment for the jury.

***

The seventh rule is:

NEVER ASK THE WITNESS FOR HELP.

A witness under cross-examination will kick you in the head - and that is what asking for help invites. It exposes your neck and invites decapitation. You will get no pity from the witness: he will have you.

Help problems usually arise after breaking the third rule about always asking questions to which you know the answer, or breaking the fifth rule about never asking for an explanation. Having asked questions to which you don't know the answer, you will usually have accumulated a series of crippling answers, and maybe an explanation which devastates you, and so you are off-balance, drowning before the jury.

***

So, with a meek smile, as you go down for the last time, you ask for a life belt:

‘Surely you cannot be certain of the identification, I mean it really was dark, that's fair isn't it?’

(and we can almost hear a plaintive *‘please say you agree, please help’*).

There is no life belt, simply the concentrated rattle of evidential machine gun fire from your implacable enemy, the witness, straight between the eyes and you sink without trace.

***

Instead, learn to look unconcerned by devastating answers. It's an act, but it is one you must learn. With a devastating answer, a tribunal will look to you, rather like an audience at a tennis match following the ball as it is belted back to you, and you must look like you can handle it. If you look as if the ball has got past you, the tribunal will take note.

Just say:

'*I dare say….*' or
'*Oh, I see….*' or
'*That's helpful…*'

Make it look like everything is fine.

Whatever – just don't look like you need help.

***

The eighth rule is:

ASK ONLY ONE THING AT A TIME.

Some advocates roll large amounts of material into a question. In the confusion created by asking too much, the witness does not answer yes or no, but picks on one detail among the many you have queried, and sets out once more on a lengthy explanation.

Lengthy explanations will destroy you.

They allow the witness to re-assert control

Importantly, they tend to allow the witness to repeat his story.

If the tribunal hears the story once, they might believe it. If twice, they're pretty much convinced now. If you blunder into allowing a third story-telling, nothing short of nuclear war is likely to change the tribunal's mind.

***

So, none of this:

‘It was dark, being night time, with street lighting to the front of the house, and you looking out the window into the back garden, isn't that right?’

One thing at a time:

It was dark? yes
It was night-time? yes
The street lighting was at the front of the house? yes
You looked out the window? yes
At the back of the house? yes

***

The ninth rule is:

WHEN PUTTING YOUR CASE, TELL THE WITNESS HE DISAGREES WITH IT.

This may sound weird.

But it is important.

Generally in England, we must put our case to the witness. In some other jurisdictions, you may not have to.

How much of your case to put, and in what detail, can depend on the individual case. There is an art to it, which you will learn with experience, and is not susceptible to written rules in an advocacy book. The general approach is to put as little as is necessary to have fulfilled your duty to have put it.

***

The reason advocates are wary of putting their case in glorious technicolour is this: if you're not careful, putting your case can become an opportunity for the witness to take centre stage to say at length exactly why your case is wrong and should be disbelieved.

The witness will repeat the best points in her evidence, will add a few more, and will look keenly at the jury persuading them to believe her.

So, don't ask*: 'I suggest your identification is mistaken, what do you say about that?'*

You'll get a very long answer.

Instead, how about: *'I suggest your identification is mistaken, but you would disagree with me, wouldn't you?'*

The answer is *'yes'*.

And only yes.

***

You have not invited justification from the witness by challenging him to an evidential fight to the death.

You have instead asked a question which invites AGREEMENT from the witness, namely *'Yes, I disagree'*.

The answer is neutral, uneventful, perfectly agreeable, and everyone has expected it anyway. You have done your duty in putting your case and quite often you will have avoided a diatribe in response.

***

The tenth rule concerns BOUNCE FOR CONFRONTATIONS.

Bounce is again about bending perception.

We mentioned bending perception at the end of the third rule.

Bounce is supremely important.

How do you get a witness to say what you want?

In an ideal world, you want the witness to cry buckets and confess their lies, to say *'It's a fair cop guv', you've got me bang to rights, I've been lying'*. They never do.

But the question is, can you get close to it?

Can you create the IMPRESSION that it is a fair cop, the witness is bang to rights, but naturally and understandably, he cannot bring himself to admit it?

Bounce is required.

***

You bounce your case off the witness.

Imagine a tennis ball being thrown at the witness, to bounce off the witness, into the hands of the jury.

We use bounce only when we confront a witness.

Unlike our identification witness who we say is simply honestly mistaken and against whom there is no need to bounce, we use bounce if suggesting a witness is the wrong-doer, the guilty party, the real culprit, the wrong'un.

For example it is highly effective where the allegation is assault and the defence is self-defence.

You put your case in great detail, simply bouncing it off the witness to the tribunal.

Get a rhythm going.

***

The psychology of what you are doing should mean it appears irrelevant to the mind of the tribunal what the witness says in response. Let’s assume a fight between males.

You say he hit you first Yes
But you hit him first No
You say he hit you on the nose Yes
But you hit him on the shoulder No
First No
With a pool cue No
While angry No
Because he'd looked at your girlfriend Not true
In a funny way No
So you hit him Lie
With a pool cue No
Twice Not true
And he hit you He did
On the nose Yes
In self-defence Not true

Notice how none of the questions in the bounce cross-examination have question marks after them. You are not asking. You are not seeking agreement. You are telling him, and expect disagreement.

***

And while delivering the bounce, mostly do not look at the witness, as it may often appear intimidating.

LOOK STRAIGHT AHEAD,
into space,
or at the judge,
or occasionally for emphasis to the jury.

This is the moment you clash swords with the witness.

This is not forensic surgery: it is forensic war.

Polite war.

Remember what we said about always respecting the witness. CROSS-EXAMINATION IS NOT '*CROSS*' EXAMINATION.

And if you come off badly from clashing with the witness, at least you have been polite, so you have not lost too much precious credibility with the tribunal. But you will if you are rude and then lose. Tribunals hate rudeness. Rightly so. You don't know what really happened in a case. You are simply following instructions. So when you bounce, be formal, be firm, but DON'T GET PERSONAL.

***

And use your stature, your head held high, your body movements purposeful, your deep voice, your politeness, your short questions, as you bounce to persuade the jury your case is right and the witness is wrong.

***

Remember, the witness has less armour in the witness box. You have a robe, maybe a wig. You are protected by books and files. You are practised at persuasion. You have done it before. You have an advantage.

This is the time to use it.

You’ll often look more of an expert than the witness on the witness's own case.

Wield that sword.

But always politely.

***

I wish now to speak of something I call ‘the lever’.

When considering bounce, we may look for THE LEVER – it is notionally what drops the witness through the evidential trapdoor when pulled.

But be careful. It can be upsetting in court and should only be reserved for the ‘right’ witnesses. We can look for it in every witness, whether using bounce or not, and we must always ask whether it should be pulled.

Sometimes to pull it unsettles the tribunal. To take an obvious example, it need not be done where a mother is giving character evidence for her son. You don’t need to put it to her that she is outright lying to protect one she raised, nursed, helplessly loves, and is incapable of telling the truth knowing her boy will go to jail. You might carefully make that comment later, but Mum may not deserve to be witheringly confronted in the witness box for showing loyalty. A tribunal will sometimes find that loyalty agreeable, while it will nevertheless politely disregard the testimony.

So remember - a tribunal will be unhappy if you pull the lever on the ‘wrong’ witness.

***

For almost any witness there is some feature of evidence which is just not quite right. It leaves him open to attack, to being undermined, or to mild embarrassment. I don't mean exclusively stinging red-faced embarrassment. I mean the sort that creates a moment of silence and everyone realises something is wrong, like when a fisherman tells tales of how big was the fish, or when someone overstates how good they are at speaking French, but then cannot follow what you say in the language. It is the embarrassment which follows when you catch someone out, and is the most effective result of cross-examination. If you destroy a witness, sometimes he or she receives sympathy. But if you embarrass a witness, the moment can hang like lead.

So, the lever should create embarrassment.

The thinking is*:* *if I pull this, does the witness get written off?*

Or: *if I pull this thread, does the testimony unravel?*

***

There is another way to think of the lever.

My Head of Chambers, the late great Michael Hill QC, used to speak of fishing and getting a nibble. You have to know when an evidential fish is near the line, unknowing but moving the hook, and how suddenly you then strike. It takes instinct and experience.

I can't teach you much about it, other than to keep your eye out for the day you understand my meaning. While I can teach you how to play the advocacy *Fur Elise*, perhaps note-perfect and a tad wooden, creditable nonetheless, I cannot teach you how to *feel* the music – but it will come.

***

A frequent example of a lever is a *previous inconsistent statement*.

This is where a witness has said something in evidence which can be contradicted by referring to what was accurately recorded as having been said by him previously.

It sounds easy to do, but there is a method.

If not followed, you will probably go wrong.

***

The first step is to refer to the evidence in chief. Get the witness to repeat what he said.

Let's suppose he earlier said: *the cat sat on the mat*.

Your first question is:
'*It is right, is it, that in your direct evidence, you said that the cat sat on the mat?*

And now add:
'And you are clear in your recollection that what you said is correct?'

The witness should therefore be made to CONFIRM the testimony.

And if necessary, use the judge's note or your own to pin the witness to extract the confirmation.

***

Now you box the witness in by making sure there is no room for manoeuvre. We call this RING-FENCING. It requires locking off escape routes, closing down the rabbit runs, corralling the witness, by placing a notional ‘ring of fences’ around him, one piece of fence at a time, until there is no way out.

<u>This is the most important part of the exercise.</u>

You mean the black cat, not some other cat?
You mean on Monday, not on Tuesday?
You mean the mat in the frontroom, not the bedroom?
You mean in the morning, not in the evening?

You give the witness plenty of evidential rope to place around his neck. You emphasise through your questions, and the witness’s agreement, that the black cat sat on the mat in the living room on Monday morning. Tell the witness if he has made a mistake, he should say so.

But by now the witness is usually dug in, and will not back out, because to do so would mean spectacularly undermining himself.

If the confirmation and ring-fencing is done right, the witness is now perfectly poised, on pulling the lever, to be dropped out of the case.

***

Now you turn to the document which is the previous inconsistent statement.

First, you get the ORIGINAL document.

Then you pass it to the witness to agree its AUTHENTICITY, drawing his attention to his signature upon it, or some other feature of reliability, and at the same time being careful, by maintaining the pressure of your questioning, to stop him reading it.

A formal statement will often include a signed DECLARATION that it is true on pain of prosecution to the best of his knowledge and belief.

Here is what you say:

> *'Here is an original document – it is your statement to the police, which you know to be an important matter - please note that your signature appears upon it under the declaration of the truth of this statement, your having reviewed this statement before signing so important a declaration, that's right is it not?'*

Read out the 'declaration of truth'….slowly – it is usually something like: *this statement is true to the best of my knowledge and belief and I make it knowing that I will be liable to prosecution if in it I have stated anything I know to be false or do not believe to be true.*

***

Now for some more ring-fencing: you draw attention to WHY THE CONTENTS OF THE STATEMENT MUST BE TRUE.

You turn to why he made the statement, that the matter was important to him, perhaps that it was made to a police officer, or lawyer, was official, and formal, and that as a record he appreciated it might be used in court proceedings, that he read it over, was careful to be sure its content was what he meant to say, in his own words, he was not being told what to say, and that he understood every word in it, had his reading glasses (if he uses any), can read, read it over, signed it after consideration, was not incapable of understanding its content, was sober, of measured mind, with events fresher in his recollection than in court.

If you do not do all this, when you later put the inconsistency he will usually claim he did not read the statement over, it is inaccurate, they were not his words, he did not understand it was important, was still drunk, on medication, distracted by aliens, whatever… he will slither like an eel out of the trap – *and he'll get away!*

***

Only after he has agreed the statement is what he meant to say, only then, GO TO THE INCONSISTENCY – not earlier.

And take the witness to the inconsistency, precisely, crisply, pinpointing the relevant section which contradicts his testimony… exactly… and *read it out* – don't ask the witness to read it out – you do it, or the witness will again slip away, pretending not to be able to read, will have forgotten his glasses, will start from the wrong section, will read only that which embarrasses your case, and will take over the pace of the cross-examination – no, you read the section, asking him to follow.

***

Here is what you say:

> *‘On page three, in the second paragraph, on the third line, we see a sentence which starts ‘I was in the frontroom…’, do you have it?*
>
> (Pause while the witness catches up).
>
> *‘Please correct me if I read this incorrectly. Your statement reads: ‘I was in the living room on Monday morning. I have a cat. It is black. The cat likes to sit on a mat in the living room, only that morning, the cat was nowhere to be found.”*
>
> (Pause)
>
> (Look to the tribunal)

***

Now pull the lever.

> *‘In evidence you say the cat sat on the mat, in the statement you signed as true you say the cat was not around – you’re not reliable, are you?*

You drive an unanswerable rhetorical wedge between the answers. This is pure bounce - it won’t much matter what the witness says.

It is the moment of ACCUSATION.

Which if you followed the map above should be unanswerable.

***

Obviously, the lever on previous inconsistent statements is the bread and butter of cross-examining defendants, whose police interviews are often very different to their court testimony.

Learn to do it well – it is a critical feature of effective cross-examination.

***

The key concepts to using a previous inconsistent statement are:

> **C**onfirm the evidence in **c**hief,
> then **R**ing-fence it so there is no weasling out of what was said later;
>
> next, produce the **O**riginal,
> confirm its **A**uthenticity,
> refer to the **D**eclaration of truth,
> and ring-fence him further, this time into **W**hy the statement is true;
>
> now **G**o crisply to the inconsistency, reading it out,
> and then **A**ccuse.

Taking the first letters of the key words *confirm, ring-fence, original, authenticity, declaration, why, go* and *accuse*, we have CROADWGA and we can create a mnemonic sentence:

> ***Carefully ring-fence or a dodgy witness gets away.***

If you follow the meaning of the mnemonic, and the meaning of each of the first letters, most cross-examinations on inconsistent statements will work remarkably well.

And remember, the absolutely critical feature is the two stages of RING-FENCING –

> ring-fence the evidence as *accurate*,
> ring-fence the statement as *reliable.*

***

Let us summarise what we have learned.

Please remember - *Don't cross-examine unless you really have to*.

But if you have to, here are the ten rules again.

***

THE TEN TOTALLY TREMENDOUS RULES OF CROSS-EXAMINATION

1 Think commando.

2 When you have got what you want for your closing speech, stop, stop, stop.

3 Never ask a question to which you do not already know the answer.

4 Always ask leading questions.

5 Never ever, ever ask the witness to explain – never ask *'why'*.

6 Reserve your comment for the jury, never ever, ever for the witness.

7 Never ask the witness for help.

8 Ask only one thing at a time.

9 When putting your case, tell the witness he disagrees with it.

10 Remember bounce for confrontations.

***

Look for the lever, but only use it for the ‘right’ witness.

And when using a previous inconsistent statement, always remember what the first letter means in each word of the following mnemonic:

carefully
ring-fence
or
a
dodgy
witness
gets
away !!!!!!

***

Chapter 16

Re-examination

In general, DON’T DO IT.

Only do it if you are very good.

It tends to highlight to the tribunal the areas you think are weakest in your witness.

And if you don't do it, it often makes it look as if you feel your witness has done well, even when she hasn't.

***

One circumstance for re-examination is where cross-examination has opened up an area for exploration which you would not have been allowed to explore in examination in chief. But the point here is this is not truly re-examination – it is more a species of examination in chief you are allowed after cross-examination. True re-examination goes over ground covered in chief which was then battered under cross.

An example of a new area might be in a domestic violence case where under cross-examination there are questions about the history of violence in a relationship which you could not have asked in chief as the evidence had been limited to the allegation on the indictment. Arising from the cross-examination, you may be able to ask the witness to go through the whole history. You would need the permission of the judge. But as you can see, it is a species of renewed examination in chief – it is about teasing out new material.

***

A particularly good reason for re-examination is TO MASSACRE your opponent.

If the witness is twitching with righteous indignation at a bad cross-examination by the opposition, let her repeat the core points of her evidence, ask her if he agrees with the foul suggestions made by the opposition, ask her if she is inaccurate or exaggerating, or unreliable, or lying, whatever, and finish with the question:

‘Finally, is there any truth in the suggestions made by my learned friend?’

You massacre your opponent's case.

You massacre your opponent’s credibility.

***

However, if a problem has arisen in cross-examination, then in re-examination you get a chance to cure it – though everyone knows there is a problem now, and the credibility of your case can hinge on how well you rescue the witness, without leading. Re-examination is often quite dramatic and you can hear a pin drop, as everyone cranes forward to hear what is said.

So the first rule is don't wing it – get it right - PREPARE IT. Ask for time if necessary.

The second is THINK AHEAD – work out realistically what the witness can put right, whether the witness has the wit to see the problem and help herself, and whether it is better to explain away the problem in closing than risk the witness being re-examined on it and making matters worse. To an extent you have to think for the witness as to whether re-examination will work out worse.

The third is use the previous testimony for PIGGYBACKING – mercilessly. What this means is fix the witness clearly on the testimony you wish to explore by quoting back what was said. Keep tightly to that testimony, or the witness may wander into chaos. And to get this right, you need an instinct for people – see rule 2. And use lots of closed choice and closed yes-no questions, for which you ought already to have foundation from the previous testimony. Basically, you almost lead, but not quite – it's an art – like I said at the beginning, you may not be much good at it at first, so be careful, and always be asking yourself, how is the witness coming across, not are you getting through it – ask yourself, is the witness being credible as she digs herself out of the cross-examination hole.

***

Let’s think back on the cat on the mat…

In cross-examination you said your statement was true, that the cat was nowhere to be seen, whereas in direct examination you said the cat was sat on the mat – I wish to ask you some questions on this, do you understand?

Yes

At the time of the offence, was the cat on the mat or nowhere to be seen?

Nowhere to be seen?

Before the offence was the cat on the mat or nowhere to be seen?

On the mat.

How long before the time of the offence was the cat on the mat?

Five minutes before.

After the offence, when did you next see the cat on the mat?

Five minutes after.

When you said in direct examination that the cat was sat on the mat, to what stage in the story of the offence were you referring?

To the five minutes before.

In your direct examination, did you mean to say that at the time of the offence the cat was sat on the mat?

No

What did you think you were saying?

I thought I was referring to where the cat was just before, but I can see this may have come across as where the cat was at the time?

Why did this happen?

Well, I was confused, and uneasy.

Why were you confused and uneasy?

I am not used to being in court, and did not appreciate how important where the cat was, and exactly when – I’m sorry.

If you did not appreciate if it might be important exactly where the cat was, and exactly when, how does this affect your testimony on the offence itself?

It doesn’t, I guess the cat ran off to avoid the violence, I may be wrong about where the cat was at the exact moment the knife was used, but I am not wrong about the details of the stabbing.

***

Re-examination does not work every time - but note the tightness of the questions before they become open, the preparation, the piggybacking, how the witness has been alerted to the problem, and how you have created an opportunity for the witness to dig herself out of the hole.

Alternatively, if you judge her from your innate understanding of personalities to be unable to reconcile the inconsistency, you may reserve your comment for closing that who cares where the cat was, it is a minor and insignificant detail, it does not affect the reliability of the description of the offence, and in this way avoid the risk of re-examination merely drawing attention to what cannot be answered.

***

Chapter 17

Improving Questioning

There is a drill which can work wonders at improving your ability to ask leading and non-leading questions.

It will teach you the difference between them.

It will teach you to be comfortable with the difference.

***

To improve *non-leading* technique, you need two colleagues, three pieces of paper and three pens.

We'll call them Jack and Jill.

Jill draws a simple shape which you do not see.

With your pen in hand, you ask questions non-leading questions of Jill to describe her drawing.

You now draw what you hear described.

And Jack does the same. He draws what he hears described by your questions of Jill.

Both of you, separately, without helping each other must draw EXACTLY THE SAME SHAPE AS JILL: same angles, same size, same scale.

***

Exactly the same.

Your questions must be precise to elicit the precise location of the various lines in the shape.

What shape have you drawn?

A boat

From bow to stern, how long it?

6cm

Where on the paper is it, in the middle, on the right, towards the top, exactly where?

It’s centre is in the centre of the paper.

Has it sails or funnels?

Funnels

How many funnels?

Two

How many decks?

Two

Is there smoke rising from the funnels?

Yes

From both?

Yes

And so on

***

At the end of the exercise, compare drawings. Check your drawing with Jill. Check Jack's drawing with Jill.

The more exactly your drawing matches hers, the more accurate and focused your questioning has been.

And because you have not known what her shape was, your questions will naturally have been non-leading.

***

And here's the clever bit. The more exactly Jack's drawing matches Jill's, the more effective your questions have been to the ear of Jack in creating in his mind exactly what is in Jill’s, so that he can now share Jill’s mind.

In other words, you will get some idea of whether from your questions a tribunal could have formed the SAME MENTAL PICTURE, in the same dimensions, of exactly the same shape, as is on Jill’s paper, also as you have formed in your mind, and as has been formed in the mind of Jack.

This exercise allows you to measure how effective your questioning is because if Jack’s drawing is way off from Jill’s, and from yours, then your questions have created a lousy picture in his mind of what Jill is trying to say, and you can see he has ended up seeing things differently from you and from Jill.

At the end of direct examination, everyone’s mental picture should be the same as that of the witness – get it?

***

Now for *leading questions*.

To improve leading technique, you need Jack and Jill, two pieces of paper and two pens.

Jack draws a shape unseen by Jill.

You look at Jack's drawing and you ask leading questions of him.

You know exactly the image you wish to create in Jill’s mind.

Through the leading questions you describe the shape.

Jill listens to the description you put to Jack.

If your leading questions are unfocused or clumsy, Jack will disagree with what you put to him, just as a real witness would under cross-examination.

You want Jack always to answer yes. This is the key to leading question technique.

***

But you want to be so methodical and focused in the questions that they basically amount to instructions to Jill about how to draw exactly the same shape.

The shape is a boat, that’s right isn’t it?

Yes

It has 2 funnels?

Yes

Each funnel produces smoke?

Yes

The boat has one deck?

Yes

The bow of the boat is centred one inch from the left edge?

Yes

The rear of the boat is centred two inches from the right edge?

Yes

And so on.

***

At the end of the exercise, look at Jill's drawing.

It is a representation of the picture you have created in Jill's mind.

Once again, you can measure the effectiveness of your questioning as you now have some idea of the sort of picture you have created in a tribunal's mind.

To be good any good at questioning, you want Jill to have drawn pretty much exactly what is on Jack’s paper.

***

These exercises work.

Very well.

Try them.

Often.

The learning curve is exponential.

***

Chapter 18

Experts

Questioning experts is not impossible.

So don’t panic.

There are two killer features to calling or cross-examining an expert:

PREPARATION & LANGUAGE.

***

Experts can be on many things – though in court, most usually concern DNA, forensics, medicine, money, or engineering – in international tribunals, they may also deal with regional politics or history.

The first thing a young advocate usually thinks when contemplating what to do with an expert is that the expertise will be too hard to understand. After all, that is why there is an expert. Whatever the expertise, it must all be too complicated for ordinary minds.

Here's how it goes – you see a report from a structural engineer, with lots of figures and graphs - or from an accountant with even more graphs – or from a scientist offering math to show the statistical improbability of a chance DNA match – or from a pathologist on the effect of carbon monoxide on haemoglobin. And you think: *OMG, what am I supposed to do with this*!

But take a deep breath.

Advocates are clever folk. If you have got this far in your career, then odds on, you do not have an ordinary mind. Be confident in your ability to get to grips with the expertise.

So, just what do you do with that complicated report?

***

Well, *read it – carefully.*

Do not mark the report yet – just let it wash over you. Relax. Enjoy it. Most reports are a great read. You have a case, you know what the issues are, so read the report knowing it is not from outer space – it is relevant, and much may turn on it. Smile at all the math, the chemical formulae, the big words, the pie charts, the x/y axis, and any venn diagrams – they will all make sense soon enough.

Remember, the report has to be relevant to an issue. Identify the issue. And look for what is said specifically about that issue. A lot of the clever stuff is often background, merely leading up to engaging the issue, and looks good, intimidating even, but is not the point. With your training, work out what the point is, and then work backwards to why the expert thinks she can nail that point.

In any case, whether civil or criminal, usually someone is just plain wrong – the person may be lying, or mistaken, or negligent, or maybe a bit weasely – no matter how many pages, or how complicated it can be made to seem, usually someone has made a mess – so find out who, and work the case.

Now turning to the report, and how it deals with the issues, look with care at the steps leading to the critical point. See if they make sense. Ponder the language of the report. Use a dictionary. Make sure you understand what is written. If you do not, then again, *don't panic*! as you will have a conference with the expert at some point, if only at court.

***

A conference with an expert should not begin with: *tell me what this is about?* – you should already know – from intelligent reading - and you should only really have questions *for clarification* or *on the issue*.

When questioning either, USE LANGUAGE LIKE THE EXPERT.

You really need to get this – please listen up.

You need to be able to ask questions in a way the expert understands. Words will have specific meanings – find out what they are.

Importantly, you want to avoid the expert correcting you in court as to your use of language – pointing out how sloppy you are – or how you don't understand a precise meaning – all of which makes you look dumb, and if thought dumb, you may not be persuasive later.

It is so easy to avoid this mistake – just read carefully and, I mean it, use a dictionary – if you don't, you will look dumb, promise.

***

There are usually two experts – yours and theirs.

With yours, in conference, always ask these five questions - always, always –

1 who is more experienced - yours or theirs,

2 what is our best point,

3 what is their best point,

4 if you were on the other side, what would you attack and why,

5 how do we win this?

***

You will usually find that where there are two reports, they will not be far apart, as experts do not like to call each other ‘flat wrong’ – as despite all the math and charts, there are usually many areas of grey.

This is important to note, as a killer question can often be, of the expert on the opposition side:

> *Is it right that the degree of difference of opinion between the two reports is perfectly normal within this area of expertise, so that you cannot prove the other expert wrong?*

***

When dealing with theirs, do not get sharp in court. Ever.

Experts are regarded as civilised sorts, above the fray. It is unbecoming to put them through a cross-examination grinder. Questions should be designed to tease out bottom lines, and sometimes points of fine distinction, but not to harangue them as liars.

It sits ill with a judge or jury to see an attempt to destroy an expert. Sure, she may be wrong, and even biased, a hired gun, always supporting something which cannot be proved wrong, being always for one side, and therefore with a financial interest to find the same fact - for example, maybe, that a patient is suffering from ‘whiplash’, which is often an injury with no physical symptoms, and which can provoke big debate among doctors — but be careful, an attempt to destroy will usually strike an odd note.

And moreover, most experts will see the strength of a point you wish to make, so that they will often find a way to agree with it in part, to avoid all-out confrontation, where they know there is grey.

So, with their expert, NEVER FORGET COURTESY.

***

And let’s talk language again – when cross-examining their expert, this is where you will come unstuck most easily – namely, if she can correct your use of language, and show you up as stupid. So make sure you understand what specific words mean to her – there is no excuse for not understanding scientific terms – to have become an advocate, you will have had a good education, rely on it, open the books, and get to grips with the expert’s world.

Thorough preparation ought to mean you become an expert too!

On that point – for that case – on that day – you’re another expert.

***

And be sure each question is focused, precise, one point at a time.

Most examinations of an expert go wrong, whether in chief or on cross, for want of knowing precisely what you want each question to establish – so, like I say, really prepare.

This is the one area where *it is wise to write out many questions in advance*, to get the use of language right, weeding out ambiguities, and to refine the focus of the advocate.

***

Sometimes there is just one expert, appointed by the court, whose evidence is supposed to be agreed between counsel.

I am sceptical this works. It relies on the theory there is only one answer to a matter, when often expertise is more an art than a science, with much room for different views.

If dealing with one expert, then more than ever you need to be an *expert for a day*, to bend in pre-trial conference the position of the lone expert most favourably to your positon. Such a conference usually takes place in the presence of both counsel, and it amounts to a delicate questioning process, outside court, with the other counsel listening in and seeking to steer the expert her way.

When this occurs, the counsel who has prepared best will usually win. This is because - firstly the expert will see you have become quite an expert yourself, as distinct from your opposition, and sensing your potency while knowing there is often grey, will want to find the middle ground to agree with you and not be shown a fool – and secondly, if you know exactly what you want, and what is feasible, how to use language right, and understand the area well, then you'll usually make sense to the expert, reach agreement, and therefore get your way.

***

And remember, you are the expert in court.

You know how things work, how to ask questions, what the other witnesses have said – you have an advantage – so, please do not ever be worried by expert evidence – you can nail it every time.

***

Chapter 19

Vulnerable Witnesses

There is one type of witness, in a minority of cases, for whom the questioning rules I have been suggesting go out the window.

These are VULNERABLE WITNESSES.

A witness is 'vulnerable' if he or she is thought by the court to have a limited ability to understand questions. Examples are:

> Young children;
> Older children or adults with severe learning disabilities;
> Persons with ADHD, Autism, or Asperger's syndrome;
> Persons suffering from mental disorders, such as
> schizophrenia,
> bipolar affective disorder,
> post-traumatic stress disorder, and
> dementia.

Vulnerability arises where the court considers, often but not always with the aid of a formal report, that the ability of a witness to give complete, coherent and accurate evidence may be inhibited by the ability to understand questions, individually and collectively, owing to a significant impairment of intelligence and social functioning[1], which would of course apply to the above persons.

In the context of this chapter, a witness is not 'vulnerable' simply because he or she feels the prospect of giving evidence frightening or difficult.

There is now a strong movement at the Bar of England and Wales, with growing case law, which is likely to be exported to other jurisdictions, and which is already influenced by advances elsewhere, that vulnerable witnesses require a different questioning technique.

***

There is an excellent website concerning vulnerable witnesses, named:

THE ADVOCATE'S GATEWAY.

It is at www.theadvocatesgateway.org[2].

The Advocate's Gateway is hosted by the *Advocacy Training Council* - a body created by the four Inns of Court of the Bar of England and Wales - chaired by Professor Penny Cooper, and includes representatives of the Advocacy Training Council, Judicial College, Law Society of England and Wales, Solicitors Association of Higher Court Advocates, Criminal Bar Association, Crown Prosecution Service, Chartered Institute of Legal Executives and the Ministry of Justice.

There is a particularly useful online video entitled 'A Question of Practice', lasing 30mins, which shows the difficulties associated with vulnerable witnesses, preparing for trial, and how to ask questions – I respectfully suggest you watch it – it has emphatic endorsement from Lord Judge, who at the time of recording was the Lord Chief Justice, which gives it especial weight.

In addition, the website offers 'toolkits' as to how to deal with the different types of vulnerable witness, and at the time of writing, September 2014, there are 12 such toolkits.

And it is all free.

It is important to familiarise yourselves with this material as I surmise shortly only those who can show they have adapted their advocacy will be permitted to appear in cases concerning vulnerable witnesses.

***

The aim of changing the rules about how to question someone who is vulnerable is to ensure that the trial process takes account of communication abilities, *so that what is said is what the witness wants to say*. Of course, it remains the job of the advocates and the tribunal of fact to determine whether what is said is the truth, but at least the witness has had a chance in court to say as each wants said.

While there is a lot of material to consume, I sense there are five primary rules, and these give rise to advocacy challenges.

***

The first rule is that TAG questions are often not allowed.

A tag question is where you put a statement, and then tag it with something like: *that's right isn't it?*

Easy examples are: *you went to the park, didn't you?*
the car was red, wasn't it?

This is a challenge because tag questions are the bread and butter of standard cross-examination. Leading questions in the traditional sense are not allowed.

The reason for disallowing tag questions is that a person assessed as vulnerable is unlikely to understand the use of the negative, as interrogatory, at the end of a statement of fact – and will likely agree with the statement, in confusion, and for want of not seeming silly not to have understood it. It would mean that you would get the answer 'yes', not because you are brilliant, but because the witness has no idea what you are on about, which is hardly fair.

Let's look at the following question:

Jim did not put his hand inside your top and touch your breast, did he?

This requires the witness to:

1 Assess whether or not the statement part of the question is true, namely, 'John did not put his hand inside your top';
2 Understand that the tag expresses the advocate's (or more precisely, his client's) point of view, and is not necessarily true; and
3 Understand that a positive tag '*did he'* attaches to a negative question '*John did not put his hand inside your top'* – and then understand how to answer such a question.

When you look at it in this way, it is easy to see why for a vulnerable witness answers to tag questions will often be at best ambiguous and unreliable and at worst wholly wrong.

***

The second rule is to maintain a NEUTRAL tone and body language.

This is a challenge because advocates instinctively inject tone and poise into many questions, as part of being assertive to win their case.

A neutral tone is important because a vulnerable witness is likely to be too cooperative and wish to please, and will therefore agree with a figure of authority, exercising that authority through forceful tone, as you may seem in your wig and gown, irrespective of whether what is said is what the witness really wants to say, which again is hardly fair.

It follows that we must avoid suggestive questions like:

> *I suggest to you that…* or
> *It's right, isn't it, that…* (bearing in mind, this again is a tag)

***

The third rule is to keep questions *really really very very* SIMPLE.

Simple questions are always a challenge – it's a skill advocates never stop learning.

Ask the simplest questions possible, with the least number of words, in the shortest possible time, and in the simplest possible order, using signposting to help the witness follow the direction of questioning.

Make sure there is only one point at a time, in one clause, with no conditional subjunctives and semi-colons.

You should not be asking: *If you were on the top bunk, and it was dark, with the curtains drawn, you could not have seen, and therefore did not see, what was happening on the bottom bunk, is that not so?*

It is better as:

> *Have you got a bunk bed in your bedroom?*
> *Do you sleep on the top bunk?*
> *And your sister sleeps on the bottom bunk?*
> *When you went to bed on Christmas Eve, did your mum close the curtains?*
> *Did your mum turn off the light?*
> *Was it dark in your bedroom?*
> *Did you stay in your bed – on the top bunk?*
> *Did your sister stay on the bottom bunk?*
> *Without the light on, is it hard to see your sister?*

***

Simplicity is an easy concept, though hard to achieve. The difference is that, whereas for an ordinary witness questions can become more complex if you choose, for a vulnerable witness the judge will stop you.

Features of simplicity are:

1 Keep things signposted and chronological, though be aware a vulnerable witness may become confused by times and dates, sometimes having little concept of them, preferring instead to reference an event to a place.
Eg - *I want to talk to you about what happened in your bedroom*, not
I want to talk to you about 10pm on 6 June 2013 - (and note the signposting).

2 Refer to people by their first names, constantly, rather than more formally, or as he or she.
Eg – *Which bed did John sleep in?* not *which bed did Mr Smith sleep in?* and not *which bed did he sleep in?*

3 Avoid asking questions negatively
Eg – *It is not the case that John was not allowed in your bedroom, was he?* This would be better as
Was John ever in your bedroom?
Was he often in your bedroom?
Was John allowed in sometimes?

***

So, to refine their simplicity, it may make sense TO WRITE OUT THE QUESTIONS IN ADVANCE.

This way you cannot go much wrong, and it is a good discipline.

***

The fourth rule is, generally, do not inhibit CHOICE.

This is a challenge because inhibiting choice is exactly what you want to do, particularly if cross-examining, as otherwise you invite loss of control.

An example of inhibiting choice would be to ask a closed word-choice: *was the car red, green or blue?* – when the witness really wants to say the car was yellow, but now thinks yellow is not a viable answer and will choose from the choice offered, and therefore give inaccurate evidence in terms of what the witness wants to say.

The better question, even in cross-examination, would be the open question: *what colour was the car?* Or there could be a series of signposted closed yes-no questions, alerting the witness he or she can disagree with each choice offered: *Let's go through the colours of the rainbow, and you tell me which colour the car was –*

was it red?
was it green?
was it blue?
was it yellow? etc

***

The fifth rule is HELP the witness to feel at ease.

This is a challenge because in cross-examination this may be the last thing the client wants.

However, it will assist your credibility, and therefore your later persuasiveness, if the tribunal of fact can see you have taken an accommodating position towards an obviously vulnerable person.

To help:

1 Make eye contact;

2 Pause and speak slowly;

3 Refer to the witness by their preferred name, often;

4 Be conscious of the preferred use of language for the witness, who for example may have a private word for a private part of the body;

5 Be conscious of the witness needing breaks;

6 Be conscious of miscommunication, which often shows itself through long pauses, or worried looks, where through embarrassment most will not easily admit they have not understood; and

7 Be ready for the questioning breaking down, and therefore be ready to help the witness recover, perhaps by suggesting a sip of water, or a break, of by being reassuring the questioning will soon be over.

***

TAG – NEUTRAL – SIMPLE – CHOICE – HELP.

These appear the primary rules.

As you can see, the ten commandments of cross-examination go out the window – *thud*!

The point is that a vulnerable witness is no match for an able advocate – the problem is you can often get them to say anything – which is not what a trial should be about.

A trial should be about testing evidence not exploiting comprehension.

***

The development of a separate questioning technique for vulnerable witnesses, though now widespread, used to be controversial. As you can see, it affects cross-examination more, as it limits standard question models, while direct examination of vulnerable witnesses often takes the form of a prepared video, with only some supplementary questions. Many advocates are uneasy their art as cross-examiners is being blunted by an unfair erosion of their technique, giving a witness who may be playing up to vulnerability an advantage to tell untruths, unrestrained from the control mechanisms mentioned in earlier chapters.

However, this is not really so.

Vulnerability is often professionally assessed, by a person with proper training, often a psychiatrist or psychologist, who may prepare a formal report as to how and why the witness will struggle to understand. Or it is obvious, as with a child.

It is not easily faked.

And the advocate is then often allowed unusual latitude. For example, after cross-examination, a judge may permit the advocate to explain what has not been put, like the case theory, or inconsistencies in previous statements, because these would involve tag questions which the witness will not comprehend, and the inconsistencies can be elicited as hearsay, exceptionally, for example through another witness.

So there are methods of levelling the playing field.

Like I say watch the video.

***

It can only be fair to help the vulnerable to give their evidence as they would mean it.

This area is still developing, and growing, and its practice has not yet standardised. A lot turns on what is agreed with the Judge at specialised pre-trial hearings to determine the trial ‘ground rules’ – and this in turn means that early preparation is essential.

In a sense, vulnerable witness advocacy is not much more than asking questions very clearly, and to master it will mean mastering advocacy generally. Embrace it – it will test you, and make you better.

There will be much written in the coming years – so please keep your eyes on The Advocate’s Gateway.

***

Chapter 20

The Closing Speech

The closing speech is the reason advocates exist.

It is their weapon, their art, *it is the moment for persuasion*.

Some say the advocate's greatest weapon is cross-examination.

Not so.

A good speech can recover a bad cross-examination.

But a weak speech can lose an otherwise winnable case, even after a good cross-examination, especially if your opponent makes a much better closing speech.

Beware the closing speech – master it, or fail !

***

Remember how everything throughout the case should have been geared toward the closing speech.

The speech should have been sketched out on receipt of the brief.

At trial, all the evidence elicited should be weighed against how it will affect closing.

Questions of witnesses will have stopped short of comment: just enough evidence will have been elicited to allow comment later in the closing.

Closing is when you draw together all of the case, all the answers from the witnesses, all the little incidents which arose at trial, and you present your theory of the case.

The speech you make in court *ought to be within 80%* of the speech you sketched on receipt of the brief: if so, you have run the trial well; if not, something has gone wrong in your control of the witnesses.

***

Closing it is all about persuasion.

100% persuasion.

This means 80% comment.

It is not about the facts: it is about comment on the facts. You mention the facts to make persuasive comment – and comment you must, liberally, and with forethought.

Closing is not about *repeating* what the facts were:
CLOSING IS ABOUT EXPLAINING WHY THE FACTS AS THEY EMERGED AT TRIAL MEAN YOU WIN.

***

The very first thing to say about a persuasive closing speech is this:

ALWAYS WRITE IT OUT.

At the very least create a fairly detailed note.

Always.

Absolutely always.

Do not try to wing it.

Do not assume you will be inspired as you open your mouth, and that words and ideas will flow, and the case will come stunningly together.

You will be wrong.

You will miss points.

You will express good points clumsily.

***

You will blunder into points which are very much against you, flapping for some means of minimising them, instead of nimbly, deftly, subtly, and with MEASURED FORETHOUGHT skirting around them.

Write it out.

Not necessarily every word, but CONSIDER EVERY SENTENCE you will utter.

Arm yourself with careful phrases which powerfully capture your case.

***

If you need time to write out the speech and draw together the best points, ASK FOR TIME.

Do not be afraid to do so.

It often happens in Magistrates Courts or County Courts, where the pace of hearings can suddenly mean the time has come to make your closing speech.

Ask for time.

This is your moment - your client's moment through you.

Don't let it slip through your fingers.

In a Magistrates Court, you should only need five minutes to gather your thoughts – but get those five minutes.

***

I mentioned something earlier which needs repeating, and elaboration, and on your part, memorisation.

The whole point of a closing speech is to TELL THE TRIBUNAL WHY YOU WIN.

When preparing your closing speech, your first line *inside your head* ought to be:

‘We win because…’

There may be several ‘we win because…’ sentences. Having identified them, now develop them.

***

Closing is not a description of the evidence. It is not a summary of the evidence. It is a series of comments on the evidence. It is argument, not regurgitation.

So many young advocates simply repeat the evidence, without deadly comment.

Let's say that again**:** CLOSING IS ARGUMENT, NOT REGURGITATION.

It draws on the evidence which has been heard and explains to the tribunal, by reminding it of the evidence, *why that evidence means you win.*

Do not simply repeat the evidence.

***

Don’t simply say: *‘it was dark and the burglar was 40ft away.’*

You do it this way: *‘it was dark and therefore the witness may be mistaken, can you be sure he is not? Moreover, in that darkness, you are asked to be sure the witness is not mistaken when peering into a distance of 40ft. It is my respectful submission that such a distance in such darkness makes you understandably hesitate before you can say you are sure there was no mistake.’*

When you weigh a fact, ask yourself, ‘*why does this fact mean I should win?’*

Don’t assume anyone will guess why you win – spell it out.

Every time, spell it out.

***

‘Three’ is an important number in speeches.

As you know, it is important elsewhere – remember the 3-3s.

When dealing with a jury, (not a judge !), it is usually a good idea to:

TELL THEM WHAT YOU WILL SAY, then
TELL THEM IT, and then
TELL THEM WHAT YOU'VE SAID.

In this way, you repeat your best points three times.

***

Let’s see how it can be done:

Start your closing with your THREE BEST POINTS.

Summarise them.

Now go into the detail of the evidence, mixing comment, coming back to those three best points as part of the detail.

Finally, at your peroration, repeat your three best points, in summary.

See, you’ve repeated your three best points three times.

A jury is likely to remember some of them, and hopefully all of them.

***

Three is always good.

Of course, it does not really apply to addressing judges, as was mentioned before in an earlier chapter.

If doing threes with a judge, you should not repeat a point three times, as you can expect the point to be comprehended first time.

However, as was mentioned before, what you can do is find three different ways of making the same point.

There is a difference.

***

When giving reasons for an argument to the jury, give three.

A witness is unreliable, vague, exaggerating.

A witness is solid, impartial, measured.

A defendant is lying, lying, lying.

A description was extreme, absurd, fanciful.

An expert was careful, cautious, helpful.

For reasons which are a mystery, supporting a point with three reasons sounds great, and carries weight, even if it shouldn't.

Threes give you momentum.

Like a wave, your words roll over the court.

You appear relentless, unstoppable, strong.

When jurors lose concentration, which is common and understandable, even if they hear just one of three reasons, they still follow your point, as the wave and flow of your words carries the jury, even if the other two reasons are missed.

***

Threes are all about RHYTHM.

Be aware of it.

It can carry an audience.

Imagine you are sweeping the listeners home, carrying them off, like leaves in a river.

A flow of words, like a flow of water, has direction.

Actors know this.

Even if not concentrating on your precise words, an audience can be swept to your bidding by the rhythm of your sentences and the engaging mesmerising projection of your voice and personality. You can carry folk with flow alone.

***

When speaking,
remember,
remember,
remember,
VARY YOUR VOICE
frequently, gently rising and falling with your points.

A varied voice is interesting to listen to - and you want the jury listening.

Speak quietly so the jury have to lean forward and concentrate to hear you. Then steadily louden your voice from your chest - not shouting. The force of your voice now presses upon their minds.

Undulate your sentences. Quicken them, slow them down.

Emphasise words, pause, emphasise another word, pause, quietly press to the end of the sentence, voice gently rising to the full stop.

Now pounce on the next sentence, ask a rhetorical question, voice rising with the question mark, and answer it, staccato like, emphasising each word, with measured gesticulation.

Get the picture?

At least get this: don't be dull.

***

And you need to be remembered.

It may be some time before the tribunal retires to decide – find a way to make sure what you have said will be remembered.

USE A MNEMONIC.

Take your three best points, and create thee letters, and then create an expression – like this:

The three primary points I wish to emphasise are as follows. My first point is the witness was *reliable*; my second, that the *forensic* evidence is devastating; and my third, is that he *confessed* at the police station: ‘r’ for reliable, ‘f’ for forensics, ‘c’ for confession – ‘RFC’ – let’s say that stands for ‘rugby football club’ – so when you retire to consider your verdict, please remember the expression ‘rugby football club’, and you will remember these three points: Rugby is for r, for reliable; football is for f, for forensics; club is for c, for confession.

If done right, the tribunal will remember the mnemonic for years, never mind til they retire, and therefore your three best points, forever.

***

GESTICULATION can be a powerful tool.

Avoid dramatics like thumping tables.

Refrain from too much hand movement.

Do not plan it - it looks wooden.

But some gesticulation is allowed.

There is no rule which says to keep your hands firmly behind your back.

Just let it happen.

But when it does, ensure the gesticulation is PURPOSEFUL RATHER THAN PLENTIFUL.

***

PRACTISE, PRACTISE, PRACTISE your closing speech.

I'm not kidding.

Mirrors are good for this. It is a performance. Watch how you move, how you hold your head, what gesticulations naturally work.

If you can, get in front of a video camera at least once a year and get a good look at how you appear, and at what seems to work.

It’s spooky but useful. You’ll be amazed to see yourself. At first you will be embarrassed – but it is better you are embarrassed in private than you embarrass the client in public. And as you work on how you appear, you will very, very quickly improve, it’s pretty much guaranteed.

***

Listen to the sound of your words, and remember FLOW, FLOW, FLOW.

A speech should not be a treatise in scientific dispassion. It should bubble and swirl and froth.

Not excessively.

It should be about reaching inside the minds, and particularly inside the *instincts* of the jury or tribunal.

Closing should have a touch, just a touch, of drama.

It should have *heart*.

It should be restrained, with a hint of passion.

***

Persuasion is when the *facts meet feelings* – or put another way, when REASON MEETS EMOTION - you want the tribunal to feel you are right, and not just think it. You must first satisfy their heads – but they will not buy into your argument until they *feel* it's right – imagine you are shopping for a pen – you buy the one that feels right, not just can write.

When you find the persuasive argument, it clicks, it is not rational – it *clicks* – what that means or why it happens I do not know, but it clicks – you know what I mean – if you don't, go home, you'll never get persuasion - it's like an elephant, difficult to describe but you know what it is when you come across it.

Every speech should find the CLICK.

***

Criticism of witnesses should usually be MORE IN SORROW THAN IN ANGER.

Do not appear angry with a witness.

A jury will generally feel it is inappropriate for you to get righteous.

If attacking a witness, put your concerns in terms of how unfortunate it is that the witness is wide open to attack. Suggest to the jury that one is sorry to have to say the witness was exaggerating or lying. These things sadly happen. They should not. But they do. The witness should have told the truth, but unfortunately in the theatre of court, with battle lines drawn, she has become biased and prone perhaps to overstate what she saw. It is understandable but most unfortunate that she is not accurate, is not reliable, and sadly, you may feel members of the jury, even not telling the truth.

Let the jury then be angry with the witness.

But as for you, they will think you a model of restraint.

***

Of course, the speech should be all about the evidence heard during the trial.

Never fall into the trap of appearing to give evidence or appearing to give your own opinion.

You can in fact do just a little bit of both, but there are rules.

***

Providing you refer to what may sensibly be thought by most to be within COMMON KNOWLEDGE, what you say is not a form of giving evidence.

You cannot tell the jury about the life cycle of a bruise in great medical detail if there has been no evidence of that medical detail; but you can observe that bruises do not appear immediately as a matter of common knowledge – redness might, but not dark discolouration, which takes a little time, we all know this.

What is in common knowledge is a wide area. We can refer to famous films or books, to incidents in the news, and to the little irritations we all experience in shops or trains and on the Clapham omnibus.

***

The advantage of injecting these features into a speech is that the jurors identify with the advocate.

Hopefully, if it is done right, it creates a sense of shared experience, outlooks, understanding, and values.

Instead of being a lawyer talking at them, you become a person sharing suggestions with them.

If they identify with you because of shared experience, a jury is more likely to agree with you.

***

A SHARED IMAGE from outside the evidence can be a powerful peg upon which to hang an important point.

If you can associate some key feature of the case with some clear image that everyone has seen, for example in a film, then you know exactly what that image is inside each juror's mind.

The image sown is not open to the vagaries of imagination in which each person sees something slightly different in their mind's eye.

To some extent, you have precise control over the jury's perception.

Let's consider an example. It may not be the best example, but it could help to set the idea.

***

Let us suppose it is important to convey to a jury how upset a mother was at being separated from her child, which then led to an alleged assault on a police officer. You might remind the jury of the desperately sad moment in Disney's *'Dumbo'*, when the little elephant is separated from his mother. Most people on the jury will have seen it, and many will have had tears in their eyes. You might remind them, carefully, oh very carefully, of that moment to help explain your defendant's feelings at what you say is the unthinking irrational moment she may have struck out in what she thought was defence of her frightened child being taken from her. Will anyone convict, no matter how hard the officer was clouted, if you have Dumbo playing in the mind of the jury?

But be sure the image fits and is not some cheap trick to hoodwink the jury. They will not like that.

Be careful how you introduce it. Look for the click.

It's often a question of feel and experience, but a shared image can be a powerful tool of persuasion.

***

Quotations can be a peculiar form of common knowledge. Everyone is assumed to know Shakespeare and the utterances of the great novelists, philosophers and politicians. But of course, they don't really.

BE CAREFUL OF QUOTATIONS.

They can sound pompous.

They are always best delivered as throwaway lines, rather than as heart-stopping utterances.

If a quotation works, and it clicks, a jury will know.

If it does not, as a throwaway line then the jury will forgive you.

But be careful.

My own view is don't try quotes until you have a few years experience. If uttered with the wrong emphasis, you lose respect, and if you lose respect, you fail to be persuasive.

***

Turning now to opinion, the golden rule is don't appear to give your own.

Notice the word *‘appear’*.

It is all a question of how you do it.

Inevitably, a speech is an opinion.

But it has to be pitched right.

***

You dress up your opinion as comment - and then you invite the jury to consider the comment.

In other words, advocates use stock phrases like:

> ‘*You may feel that* … the defendant is lying’; or
> ‘*You are invited to consider* whether in light of the evidence the witness is mistaken’.

Or

> ‘*You may think...’*
> ‘*It's a matter for you whether...’*
> ‘*It may be that your assessment is...’*

What you are in effect suggesting is an opinion to the jury that the defendant is lying and the witness mistaken. But of course it does not look or feel like that, because instead *it is offered as the opinion of the jury*, and not of the advocate.

I guess the short point here is:
OFFER OPINION TO THE JURY AS THEIRS NOT YOURS.

***

Do not blunder into

‘*I believe …’,*
‘*In my opinion …’,*
‘*You should believe …’,*
‘*It is obvious that…’.*

A tribunal will jealously guard its right to decide a case. It will instinctively rebel against being told what your opinion is since your opinion ought to be irrelevant. Get this - I’ve said it before – you are irrelevant. The tribunal will feel only its own opinion is important.

Again, as I have said before, if you push, it will push back.

Frame everything as a delicate invitation.

So much of an effective speech is a question not simply of what you say, but of how you say it.

***

DO NOT ATTEMPT HUMOUR, unless you are very, very good.

It should always be a throwaway line, and it absolutely must fit the facts. If you step outside the facts to tell a joke, even a good joke, professionally you will almost always drown in court.

Juries hate it. Any tribunal hates it. They think you are trying to hoodwink them by amusing them, and that you think they are stupid enough to follow you because you have entertained them.

***

One other thing: juries are not stupid.

Some people like to suggest they are. But they are not.

No way.

Ever.

They can become confused. But never stupid.

Individuals on a jury may be slow, but a jury of twelve is an organ which is much greater than the sum of its parts.

Collectively it sees everything, misses nothing, and has considerable wisdom.

Mark these words:

NEVER, NEVER, NEVER ASSUME A JURY HAS MISSED SOMETHING.

***

And on that point, because you must never assume the jury has missed something, ADDRESS EVERYTHING in your speech which may affect your case.

It is fatal to ignore some feature of the evidence because it was only mentioned once, is too difficult to deal with, mentioning it will only draw attention to it, and it may open a can of worms in the jury's mind.

No, no, no.

That can is already open and you must put the lid back on.

If you can see a problem, you can be sure they can.

And if you don't deal with the problem, they will know why – they will know it undermines your case and you have no persuasive answer, and so you will lose.

***

In the early stages of your career, as a rule of thumb, try to keep a speech to no more than TWENTY MINUTES.

Any longer, and we are likely to bore the jury, unless we have all the great delivery techniques.

Just a rule of thumb.

***

As another rule of thumb, A CLOSING SPEECH SHOULD START WITH THE TEST.

If prosecuting, say to the jury:

'The Crown invites you to say you are sure he knew he was carrying drugs. That is the test - are you sure. And the Crown invites you to say you can be sure for these three key reasons …' and off you go with your three best points, succinctly, quickly and clearly stated. *'And when you consider these three points in evidence you may feel it is clear, it is obvious, applying the crucial test, you are sure he knew what he was carrying drugs in that bag'.* Now you dive into the detail of the case, repeating your three best points as you go. And then perorate with them.

***

If defending, how about starting:

'In order to convict this man, you must be sure he knew he was carrying drugs. Sure. Not suspicious. Not probably knew. Sure. And if you feel he did not know, or may not have known, naturally and properly you would acquit. May not have known. In other words, is it reasonably possible he did not know. The defendant need prove nothing. The prosecution must prove its case. The prosecution must prove there is no reasonable possibility he did not know. Nonsense, when you consider these three points …' And off you go with your three best points. And then remind them of the test again. *'In this case, sure means the total absence of a mere reasonable possibility. And I respectfully invite you to conclude that possibility is perfectly reasonable. You may feel you should acquit, that you must, knowing suspicion is not enough. Let us look at the evidence …'*

***

If you start with the test, the jury measure everything you say against it.

It gives them direction and a framework in which to place the evidence.

And of course, at the end, it is usually best to remind the jury of the test and naturally of those three best points again, giving the tidy impression you have come full circle.

***

I'd like to share with you an example of what I think is a great speech. It is when the US President Ronald Reagan on 12 June 1987 said in Berlin before the crowds in front of the Brandenburg Tor: *Mr Gorbachev, tear down this wall*. Please watch on the internet the four minute paragraph leading to this historic line.

It is great because Reagan has the 3i's – he is irresistible, invisible, and shows integrity. He does not big himself up, which he could, as US President – instead he is in a plain suit, and speaks calmly, slowly, with no theatrics, and finds the common sense position. The speech is simple enough to be delivered, or understood, by a 15 year old. Although he is appealing to the crowds, and represents them, his message is not for them – it is for his real audience, namely the person with the power to decide - that person was the General Secretary of the Communist Party of the USSR - in advocacy terms, he is speaking not to the client, but on behalf of the client to the tribunal.

Really get this - Reagan does not play to the gallery, though the people cheer, in fact he plays to the decision maker. Importantly he tries to see things from Gorbachev's perspective, and uses this persuasively, arguing that if the Soviets really do want openness and progress, as Gorbachev had been saying, then the obvious thing to do would be to take down the Berlin Wall. And there's a *gotcha* moment – where you feel he is right, not just think it – he closes with '*open this gate'*, which is rational, and then finishes with '*tear down this wall'*, which is emotional – though restrained, yet it gets you in the gut - it's brilliant, understated, utterly persuasive – and the Wall finally came down on 9 November 1989.

***

There are of course other types of speech. For example, we all know the 1961 speech of *John F Kennedy* on his inauguration, or in 1963 *Martin Luther King* telling the world 'I have a dream', or on stage when Shakespeare's *Henry V* rallies the troops – 'we few, we happy few' - on the eve of Battle of Agincourt, or in film, a personal favourite, in Lord of the Rings, where *King Theodin of Rohan* rallies the riders – 'spears shall be shaken' - before the battle of Minas Tirith. Such speeches are designed to be inspirations – they are about how hard the road will be, but how the sacrifice will be worth it – they are oratory, they are not for court, they do not work there.

Court should be a calm place, for quiet reflection – it is not for whipping up the crowd.

Better to consider are Kennedy's 1961 address to Congress to request the huge funds to *put a man on the moon* – or anything by Churchill – each making a case to a sceptical audience - look for the reasonable tone, the intelligent simple language, the flow, the rhythm – particularly in Kennedy - and their use of implacable irresistibility – particularly in Churchill's speeches on *'our finest hour'*, how we will *'fight on the beaches'*, and his 1934 warning of coming war. Find them on the internet right now.

***

And finally, in every speech,

Or in whatever you do in court,

as was mentioned in the chapter on persuasiveness:
TELL A STORY,
KEEP IT SIMPLE,
SHOW THE WAY,
ASSIST, and
REMEMBER IRRESISTIBILITY.

All in, find the *click*.

***

Chapter 21

Bail &Mitigation

In crime, if defending, despite your best efforts, the jury may have convicted.

Perhaps the defendant has pleaded guilty.

The judge must now pass sentence, and will want to consider the mitigation.

Mitigation can be tricky.

The most important thing to remember above all else is EYE CONTACT.

You must look at the judge.

***

Here is raw power.

Your judge may imprison your defendant, separating him from family and friends, and leading to his employer sacking him, never more to have a good job. A life can be turned upside down.

In some cases, the hidden agenda in the mind of the defendant is not guilt, but sentence - he will not admit an offence for fear of jail.

You are what stands between that raw power and the defendant. Your responsibility is considerable.

So look at the judge. Not at the floor.

***

Often, mitigation is about putting an offence in a certain category.

We seek ways of DISTINGUISHING OUR CASE from other cases, or our defendant from co-defendants.

We might say a burglary is of commercial not domestic premises, and therefore less serious; in daylight and not at night, and therefore less serious; when premises were unoccupied, not occupied by the sleeping owners, and therefore less serious; the offence was spontaneous not premeditated; the window was open, not broken; and so on.

By STATING WHAT THE OFFENCE IS NOT, we often help the judge to place the offence within an appropriate bracket of seriousness.

***

CALL CHARACTER WITNESSES if possible, even sometimes where the defendant has previous convictions.

It is always helpful for a judge to have the measure of a defendant from what others apart from the advocate say about him.

In the absence of live witnesses, hand up references, particularly from work.

In fact, try to have references in addition to live witnesses.

***

LOOK UP THE LIKELY SENTENCE in the guidelines - and also on in at least one practitioner guide, like in England, either *Banks on Sentence*, or *Current Sentencing Practice* by D A Thomas QC,

It is always, always sensible.

Many people fail to do this.

Even with experience, new cases present new challenges. Don't always assume your experience will carry you. It is so needlessly embarrassing to have suggested to a defendant he will receive less than is ordered.

While many fail to look up sentences, you can be sure the judge will - and it is obviously better to know what he will find.

***

KNOW WHEN TO STOP.

Often counsel begins with an excellent mitigation. The judge listens, swayed by the excellent delivery. However the advocate overdoes it, repeating some points, padding out others.

The judge's mind now wanders on to whether a good point really is such a good point, and in mild irritation at the length of the address, begins finding reasons to disagree.

Instead, RUN EACH POINT THROUGH like a swordsman, deliberately, not hurriedly, but solidly, withdraw your rapier, watching the judge for acknowledgement the point is fully taken, and now run the next point through.

List your points clearly.

Don't slash about, poking and prodding the same point, but never really killing it, or killing it too often -

One solid thrust, twist, and withdraw.

***

Finally, with deference, TELL THE JUDGE WHAT SORT OF SENTENCE YOU SEEK AND WHY.

Often mitigation is a tale of woe, but what sentence is sought is never expressed.

Review the sentencing options, explaining why each one is attractive.

Don't just leave it to the judge to decide. Help him. Offer a fair solution, tipped in favour of your defendant, rather than trying a cheeky punt.

***

Which means, be REALISTIC in your suggestion.

You will damage your credibility if you seek a particular sentence which is wholly inappropriate, like community punishment for wounding with intent.

Without credibility, your whole mitigation will suffer.

Where appropriate, refer to a sentencing authority. It is surprisingly rarely done.

But why?

It seems obvious there should be more of it.

***

While sentence is the end of a case, bail is the beginning.

Readers of earlier editions have asked for some pointers on applying for bail. This seems to be because bail applications are a regular feature of a young advocate's practice, when many readers are young advocates.

For most defendants, their bail application is the most important hearing, even though it is often regarded among lawyers, in the grand scheme of a case, as a minor procedural event. Yet, if unsuccessful, a defendant may remain in custody for many months, awaiting trial, and then be acquitted.

So, TAKE BAIL VERY SERIOUSLY.

Obvious, isn't it – though you will often hear advocates say 'I'm not doing much, just a bail app', like it is no big deal – it is, remember this.

***

BE REALISTIC.

It is the same point as for sentence.

But in addition, it means that if you do not have everything ready to make the best bail application possible, then adjourn, being realistic as to failing to get bail without everything being ready. In many jurisdictions, there is a limit to how many applications can be made, without having the burden of showing a ‘change of circumstance’, which is often difficult if in custody where a defendant’s circumstance does not readily ‘change’.

So, be realistic *both*, as to what you will ask for, and as to whether you are ready.

And being ready means having witnesses, the surety, and family at court, with written references, everyone settled as to what to do, where to be, when, what will happen in court, how long it will take, and how to behave. A good bail application is often an exercise in handling many people, not just the judge.

***

Bail also means handling the defendant's expectations. It is best to err on the side of pessimism than optimism. Do not get a defendant's hopes up too high. Be frank about bail prospects, but with an eye always on how disappointing it will be if you are unsuccessful.

This is so because bail is at the beginning of proceedings where a defendant is starting out in the criminal process. He wants to return to his normal life. There may be disbelief at being in custody. There is not yet acceptance of his circumstance. He will be praying you will succeed. You may want to say you will, to please him, particularly if you are very junior, and uncomfortable telling someone in distress what they may not want to hear. But it is cruel to raise hopes – and it may later lead to an unfavourable report to your instructing solicitor by the defendant.

***

Finally, KNOW THE LAW.

Most young advocates have not actually read the *Bail Act* – you must know what it says, be familiar with its language, identify the test the judge must apply if refusing bail, and fit your submissions to the test. The trouble with bail applications is there are so many, advocates become too relaxed, and think they have an intimate knowledge of how an application should proceed, when there may be a helpful answer staring them in the face if they would simply open a book.

I well recall my first day in London pupillage – there were two of us, all excited, and our pupil master showed us papers defending in a bank robbery, said he would make a bail application that afternoon, which would be hopeless, and asked us each to role play what we might say. I huffed and puffed noisily about how everyone has a right to bail, how the defendant's family would suffer if he was remanded, and perorated on how unfair it would all be. My colleague simply pushed back his glasses, opened *Archbold*, found the Act, and if memory serves, pointed out that an obscure section created a special presumption in favour of bail in light of the age of the defendant, who was under 21 – my pupil master asked to see, made a note, and successfully used that argument in the afternoon.

My colleague has gone on to great things, great things indeed, and you could see it from that very first day. Be like him.

***

Chapter 22

The Court of Appeal

In the early years of practice, you will rarely go the Court of Appeal.

I don’t propose to say much.

However, you will probably have some appearances, and they will terrify you.

Don’t be frightened.

The Court of Appeal is fantastic. The Judges are extremely clever, and the papers are always fully considered before you get to your feet. They know exactly what they want to talk about, and usually will tell you straight away. And they are always courteous.

***

You will usually be over-prepared. You will have been up half the night trying to think of every permutation of question you might be asked, and every aspect of the facts of your case.

Try to relax.

Keep it simple.

While you may have prepared a long and detailed opening of the application, almost always you will not utter it. The Judges will interrupt you politely and take you straight to the point which interests them. Your appearance usually takes the form of questions and you do your best to answer them. It is like a moot. Simply keep your wits about you. You may be right in what you say. You may be wrong. But don’t worry. That is why the Judges are there – to decide whether you are right.

Certainly, you should spend a little spare time sitting in the public gallery of the Court of Appeal, becoming familiar with the atmosphere and culture of the court.

***

Your guiding light is probably the earlier chapter on addressing the judge, although you can assume in the Court of Appeal, they do know the law, and a lot better than you. In fact, you will need to be well-read in the relevant law as they may of course be troubled by some fine point of distinction, and the Judges may not always agree among themselves on interpretation.

However the other points in the earlier chapter all still apply,

about speaking slowly,
with deference and politeness,
only needing to make a point once,
being brief,
making eye contact,
having prepared a short, opening statement which captures the heart of your application,
and weaving your skeleton into your argument.

Above all, enjoy the experience.

***

Chapter 23

Advocacy in International Criminal Courts

As at the date of this third edition, I have since January 2013 returned to domestic practice in London, after eight years on the international circuit.

I have taught advocacy at all the international tribunals, worldwide, and have practised at the ICTY, the ICTR, and at the STL.

International criminal courts are growing. They deal with genocide, crimes against humanity, war crimes, and terrrorism.

We call this work, international criminal law, or ‘icl’.

***

What are the tribunals?

Well, there are two ad hoc tribunals created by the UN in the 1990s – for the former Yugoslavia in The Hague (ICTY), dealing with the Balkan wars of the 1990s, and for Rwanda in Arusha, Tanzania (ICTR), dealing with the genocide of one million Tutsi in 1994.

In The Hague, there are also:

the International Criminal Court (ICC),
the International Court of Justice (ICJ), and
the Special Tribunal for Lebanon (STL).

In addition, there are local courts with international input. I call these 'internationalised' courts.

Best known are the war crimes courts in

Bosnia,
Kosovo,
Iraq,
East Timor, and
Cambodia.

In Freetown in Sierra Leone, there has been an internationalised court, known as the Special Court of Sierra Leone (SCSL), whose last case, concerning the former President of Liberia, sat in The Hague, partly in the ICC and partly in the STL.

I thought readers might like a taste of the advocacy challenges presented in these new international arenas.

There are of course – you know me by now – ten.

***

The first challenge is *the mix of the inquisitorial with the adversarial style*.

In the UK, and throughout the US and the present and former Commonweatlh, the court embraces adversarial advocacy. In serious cases, a judge rules on the law while the facts are mostly found by a jury. The presentation of evidence is controlled by the prosecution and by the defence. The issue is whether on the evidence presented the prosecution has proved its case beyond a reasonable doubt. Each side is allowed to cross-examine the other's witnesses, which means suggestions can be put in questioning.

On the continent of Europe, and throughout the former latin and francophone colonies, and former and present communist countries, the courts tend to embrace a more inquisitorial style. While there is prosecution and defence, the proceedings of law and evidence are completely controlled by the judge. He decides from a dossier of all information gathered on a case what evidence to hear live, and mostly controls what questions will be put to witnesses, often asking the vast majority of questions. Cross-examination is not allowed, as it is thought it might erroneously place suggestions in the mind of the witness. Essentially, the judge finds the facts, and is active in inquiring into the truth of a matter, asking himself whether a suspect who appears to be guilty is in fact beyond reasonable doubt guilty.

***

In international criminal courts, judges and lawyers are drawn from around the world from both systems. This daily creates very different perspectives on how best to proceed in trial.

Although there are some variations, the international system is essentially adversarial, with the prosecution and defence deciding what evidence shall be called. Cross-examination is allowed. However, the court is presided over by a bench of usually three judges, of sometimes mixed international and local background, who also find the facts.

Any advocate needs first and foremost to know the background of his three judges. In this way, submissions and questions can to some extent be tailored to the expectations of the bench.

***

In five trials in three tribunals, I have observed judges from Scotland, Jamaica, Korea, St Kitts in the Caribbean, Lebanon, Burkina Faso, Denmark, Ghana, Argentina, Australia, Pakistan, Norway, Sweden, Switzerland, the Czech Republic, Cameroon, and Kenya. Prosecution advocates with whom I have worked have been from the US, Nigeria, Jamaica, The Netherlands, Canada, South Africa, Lebanon, Botswana, Germany, New Zealand, Cameroon, Tanzania, Rwanda, India, Thailand, Uganda, The Gambia, New Zealand and Australia. Defence advocates have been from the US, Senegal, France, Cameroon, Lebanon, Canada, England, South Africa, Kenya, and Germany.

It’s quite a mix, and is enormously interesting.

In fact, the mix makes it the best job in the world.

***

Time is precious in the courtroom, where events of magnitude are considered, and there is not enough time available to hear absolutely everything which might conceivably be relevant.

It is difficult to keep things short.

But this is what is needed – *keep the evidence as short as possible.*

The Rwanda genocide embraces three months of slaughter throughout the country. The Balkan troubles embrace four wars involving three countries and NATO in seven years.

Your average UK burglary or murder is usually one event relating to limited victims with limited defendants on limited dates. Such trials are generally short.

International trials are long. There is so much evidence that it is sometimes difficult to know where to start, what to say, and when to stop. Trials always last many months, and often years.

***

This means an advocate must have a good nose for what really matters, and what lies at the heart of a case, rather than what is interesting but peripheral. A trial should be about guilt, not history. These lines can blur.

AT ALL TIMES FOR AN INTERNATIONAL ADVOCATE,
THE FOREMOST QUESTION IS:

> *If prosecuting, does this fact offer proof of guilt?*
> *If calling defence evidence, does it suggest innocence?*
> *If neither, exactly why call it?*

If the advocate is not sure, then it is generally not relevant.

It is not the other way around, namely I will call it unless I am sure I should not.

I repeat: *if the advocate is not sure, then it is generally not relevant*.

***

This is the second challenge – *determining what is relevant* in order to keep things short.

You must pay very careful attention to this. Often advocates prosecuting and defending work in teams, so that everyone's work is constantly reviewed by others. This can lead to advocates erring perhaps far too much on the side of caution for fear of criticism from colleagues. In this way they will hesitate to drop a fact from evidence in case someone else might think later it could have been helpful. As a result, a lot of irrelevant material ends up being gathered, taking up valuable court time, and not determinative of any issue, but only offered so the advocate can… well… cover his back.

Remember courage. You need this.

Don't be afraid, after listening carefully to colleagues, nevertheless to stand by your judgment and drop material.

***

Because time is precious, *legal argument is almost always written*, so that court time can be used hearing from witnesses.

The third challenge is therefore that there is a lot of writing.

A style of presentation has emerged.

A written motion begins by identifying a problem and asks for a remedy.

It then refers to the law. This can be found in a tribunal's rules of procedure and evidence and in the many authorities created by the Judgments and interlocutory Decisions of the international courts. Legal precedent in the ICTY and ICTR is mutually binding, as both share the same Appeals Chamber, while if international precedent is decided elsewhere it is considered persuasive.

The legal references must all be carefully footnoted.

The motion then discusses the facts of the problem and why the law fits the facts.

***

Finally, there is a prayer, seeking that the tribunal adopts the remedy sought.

The other side *responds*, which then leads to the applicant's *reply*.

Written advocacy takes up considerable time and often is required outside court sitting times, so that an advocate's working hours can be very long.

In time, the chamber issues a written *Decision* or *Judgement*.

***

Because almost all legal applications lead to written submissions, there are a lot of fillings, stored in a database, including the decisions, which are collectively referred to as the ‘jurisprudence’. Lawyers need to know how to find precedents, and become skilled at database research.

To my mind, the leading works on the jurisprudence of the international courts are:

> *Archbold’s* International Criminal Practice, and
> *Blackstone’s* International Criminal Practice.

There are many other works, while the jurisprudence is changing rapidly, yet these have collated the most information each in one work.

***

The fourth challenge is *the jurisprudence is voluminous and can be complicated*.

Judgments in trials and on appeal often run to hundreds of pages. And there are hundreds of interlocutory Decisions.

Indictments are long.

They lay out the charges, and often summarise facts in a growing jurisprudential legalese. There is not much in the style of an ‘opening note’ where the bench is offered a complete review of what evidence it is thought will emerge.

Usually, there are many charges which appear to allege pretty much the same thing. For example, genocide, conspiracy to commit genocide, complicity in genocide, and incitement to commit genocide. There are subtle differences, but what has emerged is an approach by jurists that the differences make the charges mutually different, when factually they overlap, and I do wonder whether less is more, and that we might simply charge less but more robustly.

***

Aiding and abetting is a specific mode of participation in an offence which is different to being the principal, whereas in the UK, that difference has been abolished, and is relevant only to sentence. Other modes, requiring separate pleading, are planning, instigating, ordering and committing an offence, or being a superior to others who participate in the above modes. I do wonder whether modes of participation ought to be less legalistic in the international courts. They are in essence simply the factual method of participation, and may not need to be so separately legal.

Another mode of participation is in a joint criminal enterprise, or JCE. It is difficult to define, as it refers to being a member of a group with a common criminal purpose, and how a defendant participates in that purpose is arguably without clear parameters.

The pleading of indictments has become very complicated. It may be that in time, there will be a return to greater simplicity. A good example of the trend toward the clarity of simplicity is the indictment against the former President of Liberia, Charles Taylor.

As for the judgments, long though they are, they are fascinating if heartbreaking – learn from them.

***

There may be a problem to consider. As there are so many Decisions to write, they are often written not by the judges, but under varying degrees of supervision by their legal officers, who have a high turnover, and who often begin straight out of university, with little experience yet of life and of practice. It can lead to over-long writing, and inconsistency between Decisions. It is all good work, but the icl community may need to monitor this.

The answer may be that the filing of motions should be discouraged, and more Decisions, on procedural matters, could be issued by the bench at trial, rather than there being such voluminous separate after-hours satellite litigation.

And any written arguments should generally be limited perhaps to, let’s say, three pages. Tops. If a point cannot be made succinctly, it is probably nonsense. And if a filing needs to be longer, there could be an application to extend the page count, with reasons – again, on no more than three pages.

***

The fifth challenge is *document management*.

In international trials, truly colossal quantities of documents are available. Governments have often opened up their entire foreign office files to inspection. Reports from varieties of human rights groups multiply. Witness statements grow exponentially. There are video clips, radio broadcasts, and newspaper articles. In addition, there are copious previous and current trial transcripts. And there are military reports.

Then there are translations of all of the above, into French and English.

***

Three problems arise.

First, an advocate must be able to digest the relevance of lots of material very quickly. ‘Nuff said.

Second, an advocate must be really good with the search engines available in a computer to sift the material into what is relevant. ‘Nuff said.

Third, an advocate must know *how to use relevant documents in court*. This is not easy. The trouble is documents have to be prepared in their original form, with translations attached.

***

Paginated bundles are constantly necessary - fresh ones for each witness - to create ease of page reference to assist the bench, the parties, and the witness to follow the advocate.

Often when referring a witness to a document, the advocate refers to the page in the language of the witness, and must be able to refer to the page in the English and French translations for the judges. When a section of the document is read to the witness, if me, it is read from the English, while the witness follows from the document in his native language, yet what I am saying is *simultaneously translated* into French and then into the native language: well… you can end up with the simultaneous translation from my English being different when translated into the native language from what appears in the native language document, which can then cause all sorts of trouble.

***

Moreover, because of the delay in questioning created by simultaneous translation, a witness will often be reading other parts of the native document to what you are reading out, trying to get ahead of you, which can then lead to the witness not answering questions directly, instead trying to draw the attention of the court to what the witness finds interesting rather than the advocate.

The solution? You'll need lots of highlighters to cross-reference the same sections in the different translations. And above all, keep the section of a document put to a witness short, clear and unambiguous. Find the most relevant *sentence*, rather than read out a whole paragraph or page. The more you read out, the more likely things will go wrong.

***

The sixth challenge is *disclosure*.

This is a big area.

Different advocates from different jurisdictions have different attitudes to what to tell the other side. It can lead to distrust between the parties.

In general, the prosecution is required to disclose statements of its witnesses and anything possibly relevant and helpful to the defence. The grey area is: just what is ‘possibly’ relevant or helpful?

In general, the defence is required to disclose the identities of its witnesses, and while not a formal statement, something of what each will say. The grey area is how much is just enough of what each might say to satisfy the rule while giving away as little as possible.

***

Another problem is the sheer quantity of disclosure material which must be reviewed. It runs to literally millions of pages. If a party misses something, then if the other side learns it, the usual response is to suggest the ball is being hidden and that there is a measure of professional dishonesty rather than simple mistake.

Disclosure ends up causing lots of unnecessary rows.

Calling a witness is a big task: you need to have identified what is relevant and not peripheral to elicit in evidence, prepared your paginated bundles, thought about translation difficulties which may arise on important questions, and you need to have used your computer skills to ensure you have *reviewed all the important documents* and made *fair* disclosure decisions.

***

What’s fair?

I respectfully suggest it is fair to *disclose everything unless there is positive reason not to*, rather than only disclose where there is positive reason to do so.

Give the other side the benefit of the grey.

Why? Because they will trust you and the trial will therefore run better.

And the judges will trust you too, thankful you have avoided endless tedious heated written disclosure arguments. They may think you wonderfully sensible, which will allow you later to be very persuasive indeed.

***

I have mentioned *simultaneous translation* and we need to consider this further

It makes a significant difference to witness examination in an international court.

Usually the language of the advocate is different from the language of the witness.

And sometimes from judges on the bench, and advocates opposite.

Sometimes even within your team.

***

Moreover, international courts usually as a matter of principle translate everything into English and French, being the official languages of the UN.

This means there are often three languages in play: I speak English, and am translated into both French and the local language. In the Rwanda tribunal, English goes into French, and from French into Rwandan, while the answer in Rwandan goes back into French and then into English.

It is not unusual to ask an open question, like ‘where did the massacre occur?’ to which the answer coming back is ‘yes’.

So you have to think.

You have to turn in your mind how the question might be translated, being sympathetic to the strain on the translators.

Is the question clear? Is it short? Is it unambiguous? If not, you lose control, because the witness may not hear the question you have asked, and answers something different.

Perhaps obviously, it is very useful to speak some French, and anticipate how the question will translate.

***

It follows the seventh challenge of international advocacy, where there is simultaneous translation, is *loss of questioning impact*.

There are two difficulties.

First, the question takes time to be translated, so that the relationship between an advocate and a witness is *distanced*. The questions and answers are often separated by an unconversationally-long period of time. *Rhythm* in the presentation of the evidence is lost.

Second, in cross-examination, the tone and nuance of a question is taken over by the translator, so that if putting something with direct robust steeliness, it may however be offered to the ear of the witness by the translator in an uncertain and sometimes hesitant tone, as the translator himself is uncertain of your meaning. The witness may now think you are asking for information, rather than using bounce, or putting an indisputable fact, so that the witness begins a discursive answer. *Control* over a cross-examined witness is tricky, and answers are more often longer in the international arena than domestically.

***

The solution, as in any domestic court, but perhaps ever more importantly in an international court, is to *keep questions short, clear and unambiguous*, so they can be quickly translated, with more of the advocate's tone more accurately conveyed, and consequently more quickly and concisely answered.

***

The eighth challenge can be *the intervention of the bench*.

In some trials the bench is reserved and allows the advocates to play out the evidence. In others, perhaps where the bench has judges from the inquisitorial school, there can be significant intervention during questioning.

Sometimes a judge becomes interested in a line of questioning and pursues it *proprio motu*. To an extent, the role of the advocate has been overtaken. A line from the bench might be pursued with open questions, which then become leading questions, and the line between direct and cross-examination can blur. An advocate needs to be alive to assisting the judge with the direction of his enquiry once permitted to resume control from the judge, while at the same time settling a witness who may otherwise have become surprised to have been engaging the bench directly. *All-round sensitivity* is the key.

***

The ninth challenge is *fitness*.

No kidding.

The volume of reading is huge. Then the hours in court are long – often the courts will sit from 9am to 5.30pm, with 90mins for lunch. Judges and advocates often address the court in French, requiring concentration if listening in French, and even more if listening to the English translation, which can sound disengaged from the speaker. Questioning witnesses while thinking of how questions may be interpreted and at the same time controlling the witness in the translation delay requires constant monitoring. Then after court, there is usually written work.

You have to be fit to get through it all.

And it’s every day, with work at weekends.

So go to the gym.

***

And now to the tenth challenge – *fraternisation*.

It is unfortunate that generally in international courts the prosecution, defence, and bench do not often mix.

The bench is perhaps concerned that the advocates might seek indelicately to raise trial matters privately. And the advocates, coming from different professional backgrounds, and therefore not familiar with their opposition's different approaches, often fall out - little is agreed, with witnesses often unnecessarily called who might better have been read.

***

At the Bench and Bar of England and Wales, we have 700 years of fraternization.

IT IS A GLORY.

Advocates learn from mixing with judges how the judicial mind works, that judges are real people too, and so an advocate's approach in court can improve and be better tailored to the expectations of the bench, speeding up the trial, and allowing readier persuasiveness.

Advocates learn from mixing with their opposition what problems beset each other, see each other's cases through each other's eyes, and learn to trust each other so that decisions can be taken mutually which assist the trial process. More than this, they improve their performance, they stretch themselves, by learning from each other, borrowing good ideas, and learning from the other what might be bad ideas. The robing room is a powerful and continuing university in the lifelong study of advocacy.

***

May I respectfully suggest A CALL TO ARMS to all from the London Inns of Court, no matter in which Commonwealth country you have then practised: *if you are now before the international criminal courts, bring those 700 years of fraternisation with you*.

Arrange dinners and soirees, inviting the bench and opposition. Help our colleagues to feel comfortable with each other, and with the social and professional rules of entertaining the judges off the bench. I have had some modest fraternization success at the Rwanda tribunal, working closely with two other members defending from the English Bar. Let’s keep it up.

Spread the word, and help spread our glorious tradition.

***

Finally, if you find yourself in an international court, please let me know – it's a small world and readers of *The Devil's Advocate* should know each other, and so form an unofficial robing room, through email and calls, in which to continue to test ideas and improve our skills.

***

Chapter 24

Improving Advocacy

When practising to improve your advocacy, there is a well-tested system for constructive feedback from others. It was pioneered in the USA and as I mentioned in the beginning has in the last twenty years been exported throughout the world.

In 1994, it was imported from Australia to the English Bar by Justice George Hampel of the Victoria Supreme Court, and ever since has been the foundation of formal advocacy training within the Inns of Court.

It is very simple. But it works wonders.

In this book, we will call it ‘THE ONE POINT DEMONSTRATION’.

***

In an ideal world, students of advocacy will receive training in this method from their professional governing body. However, the basics of the method are not tricky or mysterious, and can be used between friends. Be careful of developing a bad technique. But practising something is surely better than doing nothing.

So have a go. Carefully.

Gather some colleagues. For each exercise, one is a witness, one is the advocate, one is a reviewer. The others just watch.

Use an old witness statement from an old case. Or make one up.

The advocate examines the witness for no more than five minutes. It can be direct examination or cross-examination. Throughout the exercise, the reviewer writes down *the questions asked, not the answers given*.

The reviewer then performs a one-point demonstration by following six steps.

No straying. Six steps. No more. No less. No variations. No padding it out. No waffle.

***

SIX STEPS.

So here is how it works.

You are the reviewer.

The first step is to identify ONE POINT on which to review.

Only one.

There may be hundreds, but we must stick to one point, and capture it bullishly in a single short sentence which we call the HEADNOTE. For example *'I want to talk to you about keeping non-leading questions short and simple during direct examination'* or *'I want to talk to you about controlling answers in cross-examination.'*

The headnote has to be short, pithy, and to the point. It must not be a treatise. Above all it must be MEMORABLE so that at the end of the review, and at the end of the day, and at the end of the next day, and at the end of next month, the advocate can be asked *'what was your headnote?'* and she will remember.

***

The second step is to read back the questions asked by the advocate that you believe has led to the problem you have identified in the headnote.

We call this the PLAYBACK.

It is an odd thing to record the questions of the advocate, when so much of a lawyer's training is to record the answers of the witness. It takes a little practise.

Please note that it is important to have a careful note of the precise words used in the questions, otherwise the advocate will often dispute your accuracy and therefore will dispute the validity of your assessment of any problem.

Playback does not always have to be a record of questions asked. The head-note could be about body posture or nervous habits. The playback would then be a short demonstration of the posture or habit.

Whatever it is, it must accurately reflect what the advocate did or said.

***

We now explain why what was done does not work.

It is the third step and we call it the REASON.

The reason is often obvious. But don't skip this step. It focuses the mind.

It tells the advocate why there was a problem.

Interestingly, it also tells the reviewer why there was a problem, and helps her articulate what up until then she may have only understood instinctively. Understanding something instinctively is no good when reviewing advocates - you have to be able to explain your instinct. And so the reason helps both the advocate and the reviewer toward a better understanding of advocacy.

***

Next comes the fourth step, the REMEDY, in which we explain how to put the problem right.

Often, this is not obvious. You have to know your stuff.

You have to think about it.

It is no good saying something does not work, and why.

What we need now is what will work and why.

What will work?

How do you put right the mistake you have identified?

How?

Think about this.

In the reason, you explain the problem. In the remedy, you explain the solution.

Often, the remedy is not easy, but at least it will have you thinking.

***

I want to keep talking about the remedy.

The one point demonstration is not just about identifying problems. It is about providing solutions. The exercise is pointless without a solution. Just saying something does not work is completely useless.

Completely. Useless.

It is the solution we want.

I've said it again on this page because it is really important.

Most people can tell you there is a problem. But not many can tell you how to put it right.

So let's use an example with the four steps so far.

***

Let's quote an imaginary review.

‘My headnote is this: I want to talk to you about how you must always ask leading questions in cross-examination.

In my playback, I remind you that you asked the following three questions:

Where was the gun?
How often was it fired?
Was anyone hurt?

The reason for always asking leading questions in cross-examination is it gives greater control over the witness who may otherwise answer open questions unpredictably.

The remedy is to tell the witness what you want the witness to say, one fact at a time, and add words to the effect of ‘that's right isn't it?’ at the end – we call this type of phrase ’the tag’ - so turning the statement into a question, like so:

The gun was in John's hand, wasn't it?
It was fired three times, wasn't it?
Joe was hit with three bullets in the head, wasn't he?

Let me demonstrate the questioning....’

***

And so we come to the fifth step, the DEMONSTRATION.

Having explained how to put the problem right, you now *show how it is done*.

This means the review is not some airy-fairy lecture. It has visual impact which can later be emulated. The review is not ‘theory’: it becomes an exercise in ‘practice through practise’ – there’s that word again, using it in both senses.

A demonstration means the review is not dry and boring. The review now has life, and the advocate will always be able to recall in his mind's eye a visual presentation of how the problem is cured, because it has been demonstrated.

Demonstrations are a tricky business. You now really, really have to know your stuff. They can go wrong! You have to be prepared for embarrassment. Some senior advocates will run a long way from any risk of embarrassment. Don't let them off the hook. Senior advocates have a lot to teach. Encourage them to risk the embarrassment and help the profession.

Tell them, every time: *show me.*

***

The advocate finally repeats the demonstration in the sixth step which we call the REPLAY. The lesson is firmly learnt.

The replay lasts only a minute or so. It is designed for the advocate to get a *feel* for the solution, and not just to hear it or see it.

The advocate emulates the demonstration. By doing it, the solution is absorbed, rather than simply noted.

***

And not just by the advocate.

It is learned by those watching as well.

This is really important - with this method, those watching can learn just as much as those doing.

One point at a time. Demonstrated lessons firmly learnt by all.

The one point demonstration.

Try it, and tell me I'm wrong.

***

Here is a summary of the one point demonstration technique:

Step 1:	Head-note	‘I want to talk to you about one point …’
Step 2:	Playback	‘The point arises because of these questions/actions …’
Step 3:	Reason	‘The reason this does not work is …’
Step 4:	Remedy	‘Here's how you put it right’
Step 5:	Demonstration	‘Watch me’
Step 6:	Replay	‘You try now’.

Advocacy should be presented for no more than 5 minutes.

A review should last no more than 5 minutes.

Improvement is as good as guaranteed.

***

Please note you can use the one point demonstration to improve all aspects of advocacy. It need not be limited to witness exercises.

An advocate can offer for review an opening speech, or a closing speech, or a legal argument supported by a skeleton.

The one point demonstration will work very effectively for all aspects of courtroom skills.

But remember to stick to the six steps.

***

One other thing - USE A VIDEO CAMERA.

Most people have one now, often on their phone. Or can borrow one.

Make a speech to camera, play it back… and wince…

Look at how others see you. It can be a bit of a shock. But learn from it.

Identify what you don't like about yourself, about your posture, about putting hands in your pockets, about tics, scratches, rocking to and fro, about looking slightly mad.... and change it.

Record your advocacy on a video during a one point demonstration review. And then look at the performance. Get a colleague to look at it too. See what the colleague thinks. See what you think.

A video recording is a powerful learning tool. You can see what you don't like and do something about it. It allows you that rare if embarrassing treat – to see yourself as others see you.

***

If you do not arrange one point demonstrations privately among your colleagues, and if you do not put yourself on camera, then what's left?

What's left is constructive criticism of your performance in COURT.

By whom?

By your opponent.

By other advocates who were in the well of the court.

But there is a problem here. Advocates usually feel it inappropriate to offer constructive criticism to each other. It is thought cheeky.

Unfortunately, this means there is a vast army of lawyers out there who have rarely ever been reviewed. Bad habits become entrenched, obvious for all the world to see, but no one dares say anything.

***

The solution is simple: ASK THE OTHERS WHAT THEY THINK.

Certainly there will be crushing and sometimes pompous criticisms from advocates whose own skills you don't rate particularly highly. However, generally speaking, the criticism of other advocates is measured and extremely helpful. It should be actively sought. We don't have to agree with it all the time. But it provides that crucial understanding of how others see us, and of what works and what doesn't.

So ask.

And then you can walk away, unlikely to see your reviewer for some time, so that the pang of any mild embarrassment is unimportant when weighed against the fact you have learned something.

***

It cannot be stressed enough how important it is to seek the judgment of others.

Pupil barristers and trainee solicitors are rarely seen in action in court by their pupil supervisors and principals.

It really is a tiptop idea while still junior with little precious status to lose, to ask what others at court thought, and to set up in chambers or the office regular one point demonstration workshops.

By STEALING ALL THE BEST IDEAS from seniors, by allowing them to teach you, ascent up the slippery slope of advocacy excellence can be rapid indeed. Techniques and ideas which a senior by trial and error took years to perfect, can be taught in an early evening.

It is crazy for advocates to improve advocacy entirely alone all their lives.

Have the courage to risk making a fool of yourself in front of others and the rewards will be many and immediate.

***

Chapter 25

On being led as Junior Counsel

At the Bar of England and Wales, most advocates who are not in Silk are called ‘junior counsel’. To be ‘in Silk’ means to have been called forward to the front rank of the Bar by the Queen to become one of Her Majesty’s Counsel. If called forward, then you are allowed to wear a silk gown, which explains the expression of being ‘in Silk’, and to have the suffix QC after your name, meaning Queen’s Counsel.

A QC will usually lead a Junior in a case.

As juniors proceed through their careers, there often comes a time when they are sufficiently senior that they too will lead someone more junior to them, often shortly before they also become a QC.

To lead a Junior is to be a ‘Leader’, whether as a Senior Junior or as a QC.

In other jurisdictions, the advocate who is led is often called ‘co-counsel’, while the Leader is often called ‘leading counsel’.

This chapter concerns what is usually expected by a Leader of the Junior he leads.

I am writing this as no one ever told me what was expected, and I could really have used a heads-up – so I figure you might welcome what follows.

***

The first rule – and it’s a big one - is UNDERSTUDY.

You are not a secretary to a Leader, filing paperwork but inactive. You are not a like a ‘second’ in a duel, handing over the pistol and picking up his body afterwards.

You are an understudy.

You understudy everything in the case.

You must be ready to step in at a moment’s notice to replace or supplement the Leader. You need to know everything your Leader thinks, where everything is in the papers, and constantly to be imagining, both:

‘*what will he do?’* and *‘what would I do?’*

***

This means that the second rule is DO EVERYTHING.

This means you prepare the schedules of evidence, read the unused material, sketch out the examinations of the witnesses, cross-examinations, write up skeletons, outline speeches, keep a note of what happens in court – it's a big job - sure, your Leader will do much of the same, but you shadow him, do everything alongside - and above all, you try to do it all more thoroughly.

Sometimes you will be assigned a specific task – great – *but your work does not end with that task*!!!! – you do everything else, whether asked or not – basically, you work yourself senseless.

***

The third rule is COMMUNICATION.

Be available – on the phone, reply to emails, stop by his desk – keep a flow of communication going – do not send emails or agree matters without his input – run everything past him - you want to know what is in his mind, and you want him to know what is in yours – you will try the case together - though he will do most of the courtroom presentation, just like being the actor on stage, while you hover in the wings, ready, ready, ready.

***

The fourth rule is HELP.

It's a simple concept – you help your Leader – you offer suggestions, identify what the Leader may have missed, prepare examinations of witnesses, offer discreet correction if the Leader is mistaken on the facts or law - basically, you make sure the Leader misses nothing, and gets everything right.

And pleeeeaasssseee…. DO NOT WAIT TO BE ASKED – get on with helping – think for yourself – ask yourself, what needs to be done – your Leader is not strictly your 'boss' – you are in a partnership - you do not hide and await instruction – instead, you seek it, you embrace guidance, you look for assignments.

You are in a relationship during the case. It is intimate and intense. While I mean this professionally, you are in bed together.

***

The fifth and final rule is a big one too - LOYALTY.

Being an advocate is competitive. We are often only as good as our last case. We cannot be complacent. We must constantly strive to improve, and get stronger at our art. We compete with each other to garner a reputation for being better than those around us.

But do not do this with your Leader. You are working *together*.

Your Leader will often miss something – do not embarrass him, or gossip behind his back, or jaw-droppingly correct him in conference. You too will often miss things, and a good Leader will not embarrass you or gossip about you – instead, a good Leader will rescue you from your mistakes, always taking responsibility for them in his own name – so show loyalty, in the way your Leader ought to show it to you.

Do not show him up in front of the client, or judge, or in front of other counsel.

Ever.

***

Sometimes your Leader is rubbish – expecting you to do everything, paying no attention to the case, weak on the law, lazy, and maybe a bit past it.

If this occurs, you have a duty to your client, and to your instructing solicitor, to report your unhappiness with the Leader.

This does not happen often.

If it does, *consult others first,* in the robbing room, and among your seniors in Chambers.

If persuaded there is a problem, then raise it first with your Leader. Do not silently assassinate behind his back. Be honourable. Explain your concerns, show evidence, ask for reassurance. If unpersuaded, then consult seniors again. Only after, then you may act, but not before. And always with warning that you will do so.

This is simply proper professional courtesy.

***

So how does all this work – sometimes, it may seem as if you are doing everything and your Leader nothing – not so! The Leader was once a junior, and you can rightly expect the Leader to do pretty much everything too – indeed, you will miss material, it's guaranteed, and the Leader's experience ought to catch what you miss – and you may follow blind alleys, which again the Leader's experience ought to help set straight.

When working with a Leader, it is a great opportunity to learn, from one who is more experienced. Cases with leaders are usually complicated, which is why a junior is required – so there is an opportunity to do work well above your pay-grade. If you try to do everything, then you will better understand what the Leader does, and why, and ready yourself for more complicated work, advancing yourself toward in time being a Leader too.

What being led should not involve is being a passenger, sitting open-mouthed behind the Leader, with a vacant mind, simply counting the fee each day in court brings – that is being a parasite, not an advocate - no, no, no – you are his wingman, and together you head into courtroom battle – you need to know how to fly, and to try to fly as well, if not better, than him.

Remember, if he falls ill, you're on – so be ready.

Above all, enjoy being led – if you follow the five rules, your advocacy will improve - and even better, your Leader will mention you to other leaders, and will probably ask for you again.

***

Chapter 26

Bar Ethos

Before I draw this spry polemic to a close, I wish to make a plea, drawing on some of what I mentioned at the end of the chapter on the international tribunals.

As you know by now, I have travelled widely, and appeared and taught in many jurisdictions.

Earlier I mentioned how in adversarial advocacy, we seek to win, but always observing the 3 rules:

1 do not mislead the court,
2 do not be sharp with your colleagues,
3 try to think like the tribunal -

these are the beacons by which we perform in court.

But what of outside court?

All advocates are members of a ‘Bar’ – meaning we have been called to the Bar, which of old was the wooden bar which separated the judges from the well of the court. From that location, close to the judges, directly in front of them, we are permitted to make representations on behalf of the public.

Over the centuries, there has grown a BAR ETHOS – that ethos is what makes being an advocate a great profession.

***

It is a profession because *we put others before ourselves*.

Advocacy should not be about making money – it is about serving the public.

You come last, and so should your bank balance. We never put making money ahead of doing the right thing by the client and the court.

Sure, you ought to find the pay is good, but it is not about that.

If it profits you to settle (perhaps because you have another trial next day), but the client wants to fight, *then fight* – if it profits you to fight (perhaps because you do not have another trial next day), but the client want to settle, *then settle* –

NEVER EVER EVER PUT WHAT PAYS YOU BEST BEFORE THE INTERESTS OF THE CLIENT – EVER EVER EVER.

***

This is sometimes hard. At the time of writing, 2014, there are pernicious financial pressures on UK criminal advocates.

Often instructing solicitors have a financial interest too in how the case proceeds.

Resist – desist – insist:

> ‘resist’ pressure from anyone but the client,
>
> ‘desist’ from thinking how you could buy a new car if only the client could be surreptitiously bent to your bank balance,
>
> ‘insist’ on putting the client first, always,

….while at all times offering due deference to the Judge.

***

The reason the profession of an advocate is held in the UK in high esteem is that the public perceive an advocate will always do the right thing by the client – this is a reputation which has been won through 700 years, but can be lost in a matter of months. Advocates are supposed to be selfless members of a quasi-priesthood, not a haggling traders in a market: do not sell out – *client first, you last*.

Respect each other. Help each other. Including your opponent. Your higher function is to maintain public confidence in justice, not to win at any cost – remember the 3 rules. The Bar is not Gordon Gekko's *Wall Street* – great film, but it's the advocates who finally send him to jail.

Speak straight, walk straight, be straight.

Your private life can be chaos, but your professional life must be honourable.

There is a reason judges are called 'Your Honour'. Recall please, that most judges are drawn from the advocates. So act honourably.

***

The idea behind justice is that the public believes in it, and therefore allows advocates, guided by judges, to fight to right wrongs, without the public descending to medieval clubbing of each other with sticks – which people will again if you are not honourable. Think on what trust is placed in us – we act where a child has been murdered, or is being placed in care, or items of great sentimental value have been burgled, or where careers are ruined, fortunes lost, or homes seized. This is a great trust, really.

And we are trusted because we are honourable.

Which means we walk straight, talk straight, and are straight.

If those who perform in the courts do not act with honour, then why should we be trusted to resolve grievances – we won't be. And it is like a cancer – once it begins in the 'body' of the profession with a few, it will spread, just far enough, and while much of the body may be healthy, nevertheless the cancer will kill the body.

You must be vigilant to guard the sanctity of this profession, lest it may die, and the trust of ages will evaporate.

We may disagree, maybe fall-out a bit, have very different characters, but we will always act honourably.

***

It used to be that barristers did not shake hands, because there was no need – to offer your right hand, in medieval times, was to show there was not a treacherous sword in it, and therefore that you came peacefully and unarmed – but barristers never needed to be armed, for it was always understood that, as we were honourable, we presented no threat of force, instead being known to be peaceful, and reliable, and trustworthy, doing battle only with words respectfully before the Monarch's judges – keep this in mind: advocates are not hired guns, swashbuckling with blades, plotting mayhem – no, no, no, the public should always feel we do not need to show our right hand, and that we can be trusted to do right.

***

So, please, maintain connection with each other, and with the judges, through Bar associations, dinners, shared advocacy and ethics training, and get involved in carrying this profession forward to the generation which will follow you.

Wherever there is adversarial advocacy, there should be a Bar Association, gathering prosecution and defence, claimant and defendant, into a culture of professional pleasantry, overseen by the judges, who were mostly once advocates.

We are colleagues, never enemies.

***

Chapter 27

The Overall Advocate

And so we reach the end of this polemic. I don't intend to write a long, flourishing peroration. The last chapter will be a simple single page. The page will define the overall advocate, the person you should be, or becoming, after carefully considering the ideas here.

***

The overall advocate has judgement.

And

poise,
eye contact,
common sense,
good relations with the opposition,
good questioning technique,
and a great closing speech,
which has been written long before the trial begins,
and always tries to think like the tribunal, not so much the client.

At the forefront of the good mind of an able advocate are the ‘threes’:
3t’s,
3i’s,
3 best points,
3 beacons of behaviour.

And he is a credit to the profession if he is polite and he makes the tribunal really, really, really think about his case.

Above all, in everything she does in court, whether it is

addressing the judge,
questioning a witness
addressing a jury,

she seeks that rare quality of irresistibility,
which makes her look almost invisible,
as if the case solved itself.

***

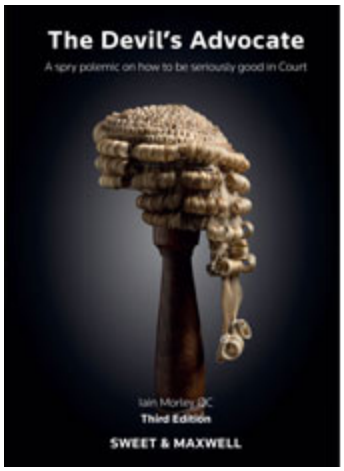
He knows he must get to the point in legal writing. She knows how to be led as a junior. Neither is worried by experts, and each is sensitive to vulnerable witnesses. Their document management is sound. Both have a Bar ethos.

Neither is a gladiator, and each remains true to who they are and do not try to be someone they are not.

This sort of advocate will very often win.

Will this be you?

***



The paperback is available from Sweet & Maxwell,
via Amazon,
as at 04.08.17 at
https://www.amazon.com/Devils-Advocate-Iain-Morley/dp/0414023226

---

[1] This paragraph, written in 2014, draws on 16(2)(a)(ii) and s16(5) Youth Justice and Criminal Evidence Act 1999. However, in an appropriate case, the court is not prevented from taking the view of its own motion that questioning needs to be adapted or the process moderated to take account of the particular needs of a witness which become apparent to it. Note, the court must take 'every reasonable step' to facilitate the participation of any person in trial, including the defendant, per Rule 3.8(4)(a) and (b) Criminal Procedure Rules 2013.

[2] As accessed on the internet on 19.09.14

This file was downloaded from Z-Library project

Your gateway to knowledge and culture. Accessible for everyone.

z-library.sk z-lib.gs z-lib.fm go-to-library.sk

Official Telegram channel

Z-Access

https://wikipedia.org/wiki/Z-Library